

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 05-44481
DELPHI CORPORATION, et al, . New York, New York
Wednesday, March 22, 2006
Debtors. . 2:18 p.m.
.

TRANSCRIPT OF SECTION 1102(a)(2) EVIDENTIARY HEARING
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commence at 2:19 p.m.)

2 THE COURT: Please be seated.

3 Okay. We're back on the record from yesterday in

4 Delphi Corporation.

5 Mr. Butler, you have your next witness on rebuttal?

6 MR. BUTLER: Thank you, Your Honor, and good

7 afternoon.

8 Your Honor at this time we'd like to present the --

9 for cross-examination Keith S. Williams, whose expert report

10 and declaration have been admitted as Exhibit Number 12.

11 MR. KURTZ: Your Honor, we filed a motion with

12 respect to the witness. Would now be a good time to present

13 it?

14 THE COURT: Yes. You're looking to strike his

15 report?

16 MR. KURTZ: Correct. It's going to be argued by Mr.

17 Baumstein?

18 MR. BAUMSTEIN: Good afternoon, Your Honor. Doug

19 Baumstein here.

20 The motion is basically about a very simple

21 prospect. During examinations of both Mr. Williams and Mr.

22 Sheehan, a number of questions were asked about the current

23 status of the negotiations at -- I guess at that point

24 ongoing negotiations between Delphi and the unions, which, as

25 everyone recognizes in this bankruptcy, would largely affect

1 the likelihood of a successful reorganization and the
2 possibility of equity being in the money.

3 During those question-and-answers, debtors on a
4 number of occasions cut off all questioning and gave
5 instructions not to answer. In their opposition papers to
6 our motion to strike, they don't make any justification for
7 such instructions not to answer, nor is any available under
8 the federal rules.

9 This relates to Mr. Williams in a number of aspects
10 because both his testimony and his conclusions are based, in
11 part, on what happened or what his understanding was of those
12 negotiations. Specifically, Mr. Williams states as part of
13 his conclusions that:

14 "The Hay Group's alternative forecast are based on
15 assumptions that result in significantly optimistic
16 alternative outcomes for Delphi's reorganization."

17 He also opines more specifically about the potential
18 demands in negotiation that, for example, the conclusions
19 that certain transitional benefits may be required to, quote:

20 "-- maintain a productive work force and to satisfy
21 the various unions that represent most of Delphi's hourly
22 paid work force."

23 Now Mr. Williams is not an independent expert. He
24 is, in fact --

25 THE COURT: Where is he, though, in either of those

1 statements or elsewhere in his report, actually referring to
2 specific negotiations, as opposed to noting, as Mr. Sheehan
3 did yesterday, that if you take something away, you have to
4 give something in return, often?

5 MR. BAUMSTEIN: Well, Your Honor, it actually goes
6 to the fact of what he lists -- what he identifies as part of
7 the basis of his conclusions.

8 THE COURT: All right. What are those?

9 MR. BAUMSTEIN: And specifically what he says is,
10 during the deposition, he says the deposition -- his opinion
11 reflects:

12 "-- everything that I know about Delphi and Delphi's
13 plans from the work that I've done for them."

14 He also testified that the work he's done for them
15 includes receiving information and running models based on
16 the ongoing negotiations.

17 On the one -- it's just fundamentally unfair for
18 them to have a testimony from a witness, as both an expert,
19 who's also as a fact witness, who's not willing to disclose
20 the basis for his understandings about potential outcomes
21 from the ongoing negotiations at that point.

22 Clearly, the issue here is what gets done with the
23 unions is going to affect the recovery, if any, for equity.
24 That's just -- that's unquestioned here. The fact that this
25 witness had some knowledge, and the fact that Mr. Sheehan had

1 some knowledge and we were prohibited from making inquiries,
2 notwithstanding the existence of protective orders in this
3 case is just simply unfair; and, as a result, I think the
4 appropriate remedy should be to strike Mr. Williams's expert
5 report.

6 THE COURT: Well, I'm still -- if the debtors are
7 not relying upon any knowledge that Mr. Williams may have as
8 to the specific status of negotiations with the unions, but
9 instead are relying upon his knowledge generally of the
10 company and the issues that one would anticipate would arise
11 in negotiations with unions, how are you prejudiced?

12 MR. BAUMSTEIN: Well, we're prejudiced because their
13 main attack of the Hay report is that it is -- it basically
14 is painting overly optimistic scenarios.

15 THE COURT: Well, you can make that attack without
16 focusing on -- I mean, you could have made that -- let's
17 assume the Hay report came out on October 16th, after the
18 petition date, before at least post-petition negotiations
19 with the unions began. Couldn't you make the same statement
20 then; i.e., "overly optimistic"?

21 MR. BAUMSTEIN: Well, they could make the same
22 statements, but when -- if Mr. Williams were, quote/unquote,
23 "relying on everything I know about Delphi and Delphi's
24 plans," which is what he said during his testimony, then I --
25 then there might be an issue if he knew what those plans

1 included.

2 THE COURT: Okay.

3 MR. BAUMSTEIN: Thank you, Your Honor.

4 MR. BUTLER: Your Honor, the sole basis by which
5 Appaloosa tries to strike Mr. Williams's testimony is because
6 they were unhappy that the debtors enforced Your Honor's
7 protective order and the pretrial scheduling order, which
8 defined the scope of discovery. We had a specific chambers
9 conference with Your Honor and a specific meet-and-confer,
10 and resolution of what the scope of discovery was, and it did
11 not include the transformation model and the assumptions
12 underlying that and, you know, beyond the steady-state model
13 that was part of discovery.

14 If Your Honor reviewed the transcript, you'll find
15 that in each instance in which -- and the only instances in
16 which Mr. Williams was directed not to answer a question was
17 when we invoked in answering, relying on Federal Rule Civil
18 Procedure 30(d)(1), in which we are entitled to instruct a
19 deponent not to answer a question to enforce a limitation
20 directed by the Court. And they were using Mr. Williams's
21 deposition, which was about his rebuttal testimony and his
22 rebuttal report to the Hay report, that's it. That was the
23 scope of the testimony instead as a further discovery
24 opportunity, to try to engage in discovery not permitted
25 under the pretrial scheduling order. And that was the issue

1 and the dispute that arose.

2 They were -- there was throughout the deposition Mr.
3 Williams fully disclosed the basis for his opinions and
4 conclusions, and he was never instructed not to answer a
5 legitimate inquiry going to the bases of his opinions. And I
6 think, Your Honor, that if -- you know, one only needs to
7 look at the deposition transcript and look at Mr. Williams's
8 report, which is directed -- and I should point out, Mr.
9 Williams obviously is recognized and Appaloosa has conceded
10 he's an expert on these matters and a qualified actuary; Mr.
11 Reese acknowledged that in his cross-examination. And so
12 there was a very -- you know, there was a very specific
13 purpose for that, and it was to protect the issues that were
14 intended to be outside the scope of these proceedings.

15 THE COURT: And as I remember the discovery
16 conference that we had, the debtors stated that they were not
17 going to rely on Mr. Williams as a fact witness as to what
18 was actually going on in the negotiations, correct?

19 MR. BUTLER: That's correct, Your Honor, and we are
20 not.

21 THE COURT: And so when he says in his expert report
22 or in his deposition, my conclusions are based on everything
23 I know about Delphi, is it fair for me to assume that he was
24 not including in that answer specific responses, proposals,
25 counter-proposals by the unions in response to proposals made

1 by the debtors during the post-petition negotiations?

2 MR. BUTLER: Yes, I believe you can rely on that
3 Your Honor. And I can tell Your Honor that I have been
4 directly involved in those negotiations personally, and I can
5 represent to the Court that Mr. Williams has not been
6 involved. I'd be surprised if Mr. Williams was even aware of
7 those matters in any kind of a comprehensive way.

8 THE COURT: Okay. All right.

9 MR. BUTLER: Thank you.

10 THE COURT: All right. With regard to Appaloosa's
11 motion to strike Mr. Williams's expert report and testimony,
12 I will deny that motion on two grounds:

13 First, as I directed at the discovery conference
14 that we had now several weeks ago in connection with
15 Appaloosa's motion for the appointment of an equity
16 committee, I made it clear that this motion is a summary
17 proceeding and should not take over all of the issues in this
18 case; and, consequently, we were not going to litigate in
19 effectively real time the status of the debtors' negotiations
20 with its various constituents, including the union, the PBGC,
21 and others.

22 And, consequently, while the Appaloosa lawyers were
23 going to be entitled to get information available to the
24 debtors informing the debtors' proposals, they were -- we
25 were not going to get into responses or developments

1 thereafter. Instead, the parties were free to make their own
2 inferences in light of that information and try to persuade
3 me that those inferences were correct. And it appears to me
4 that the expert report and the directions not to answer
5 various questions related to the expert report in Mr.
6 Williams's deposition are both consistent with that
7 instruction by me.

8 Secondly, again, in light of my conclusion that, in
9 fact, the debtor has acted in compliance with that
10 determination by me and have -- the debtors have not offered
11 up Mr. Williams as a fact witness about the status of
12 negotiations, the unions' responses to various proposals and
13 the like as a basis of their rebuttal case; that they have
14 not taken advantage of my directive improperly, and that
15 they're not offering up a new issue that Appaloosa has been
16 precluded from taking discovery on, I do not see any
17 prejudice to Appaloosa in having Mr. Williams testify or with
18 regard to the introduction of his report. I will read the
19 report and listen to his testimony with the assumption that
20 the report is not based on anything that he may know about
21 the back-and-forth with the union, which I had excluded from
22 discovery. So, Mr. Butler, you can submit an order to that
23 effect.

24 Okay. Do you want to call Mr. Williams?

25 MR. BUTLER: As indicated, Your Honor, we were

1 calling, as I indicated, Keith S. Williams for cross-
2 examination with connection with his expert report and
3 declaration filed as Trial Exhibit No. 12.

4 THE COURT: Okay.

5 MR. KURTZ: Your Honor, may I approach?

6 THE COURT: Yes.

7 MR. KURTZ: I have compiled here the exhibits I may
8 use during cross-examination.

9 THE COURT: Well, yeah. Sure. That's

10 MR. KURTZ: I have one for counsel, and one to
11 provide to you.

12 THE COURT: As long as they have the same numbers as
13 what are in the five binders, that's fine.

14 Okay. Mr. Williams?

15 Would you raise your right hand, please?

16 **KEITH S. WILLIAMS, WITNESS FOR THE DEBTOR, SWORN.**

17 THE COURT: You can be seated.

18 **CROSS-EXAMINATION**

19 **BY MR. KURTZ:**

20 Q Good afternoon, Mr. Williams.

21 A Good afternoon.

22 Q I want to start today by talking about OPEB expenses,
23 which Mr. Reese testified were overstated by \$2.6 billion.

24 Your firm, Watson Wyatt, has been the actuaries for
25 Delphi since Delphi was formed, correct?

1 A That's correct.

2 Q And you have been the lead actuary for that entire
3 tenure, correct?

4 A That's correct.

5 Q And one of your jobs for Delphi is to forecast medical
6 expenses, correct?

7 A That's correct.

8 Q And you do so in accordance with FAS-106, the governing
9 accounting standard, correct?

10 A That's correct.

11 Q And pursuant to FAS-106, you're required to give your
12 best estimate as to the OPEB expenses, correct?

13 A That's correct.

14 Q And you include your projections and calculations in a
15 FAS-106 valuation report, correct?

16 A That's correct.

17 Q And then you discuss your valuation assumptions with the
18 company, correct?

19 A That's correct.

20 Q And then, ultimately, it is the responsibility of Delphi
21 to determine the assumptions, correct?

22 A That's correct.

23 Q And the FAS-106 valuation report then contains Delphi's
24 best estimate as to its OPEB liabilities, correct?

25 A As of the date of the report, that's correct.

1 Q Okay. And when it's done, the valuation report is
2 delivered to the company's auditors, correct?

3 A That's correct.

4 Q And the company includes the OPEB liabilities in its
5 financial statements, correct?

6 A That's correct.

7 Q And those financial statements are filed with the SEC,
8 correct?

9 A I believe so.

10 Q And then they're publicly disclosed, correct?

11 A I believe so.

12 Q And so it's important that the best estimate be accurate,
13 right?

14 A Yep.

15 Q All right. Can I ask you to turn to what I hope to be
16 the first exhibit in your binder.

17 A Which --

18 Q Exhibit 70, which is the FAS-106 report for year-ended
19 2005?

20 A I'm sorry. Which binder? There are many up here.

21 Q Yeah. We gave you --

22 MR. KURTZ: May I approach the witness, Your Honor?

23 THE COURT: Yes.

24 (Witness and counsel review exhibits.)

25 THE WITNESS: Okay. Thank you.

1 BY MR. KURTZ:

2 Q Is that the FAS-106 report for year-end 2005?

3 A Yes, it is.

4 Q And that was completed on March 3rd, 2006, correct?

5 A That's the date on it, yes.

6 Q Which was just about two weeks ago, correct?

7 A That's correct.

8 Q So, obviously, it was prepared well after the steady-
9 state projections, correct?

10 A That's correct

11 Q And the driver of projected OPEB expenses is medical
12 trend rates, correct?

13 A That's one of the drivers.

14 Q And medical trend rates are the expected increase in
15 medical costs or the medical inflation?

16 A The expected annual increases in future years, that's
17 correct.

18 Q And this FAS-106 report from some two weeks ago sets
19 forth Delphi's best estimate of medical trend rates, correct?

20 A As of the valuation date, that's correct.

21 Q All right. Can you turn to Page 35?

22 A (Witness reviews exhibit.)

23 Okay.

24 Q Okay. Delphi's best estimate for the medical trend rates
25 in 2005/2006 is eight percent, correct?

1 A Those are the rates shown here for -- that we used to
2 develop the year-end liabilities as of 12/31/2005, that's
3 correct.

4 Q Okay. Then it goes down to six percent in 2006/2007,
5 correct?

6 A That's correct.

7 Q Then down the next year to five and a half percent?

8 A Yes.

9 Q The year after that to five and a quarter percent?

10 A Yes.

11 Q And five percent thereafter, correct?

12 A Yes.

13 Q All right. And it was these medical trend projections
14 that Mr. Reese adopted in his report, correct?

15 A I believe that that's correct, yes.

16 Q Okay. Now the company, on the other hand, did not use
17 these projections in its steady-state projections, correct?

18 A They used these assumptions in developing -- I believe
19 they used these assumptions developing the disclosure and
20 expense in the first year of the projections.

21 Q Am I correct that the steady-state projections do not, in
22 fact, assume the medical trend rates that we just read into
23 the record as reflected in FAS-106 report?

24 A The first year, the steady-state projections do, in fact,
25 as I understand it, reflect these assumptions.

1 Q But not in 2007, 2008, 2009, 2010, or thereafter,
2 correct?

3 A That's correct.

4 Q All right. And, rather, the company substantially
5 increased the medical trend rate, correct?

6 A That's true.

7 Q In fact, it nearly doubled it, right?

8 A I don't recall the rate of increase, what they --

9 Q Okay. Can you turn to the next exhibit in your binder,
10 which is part of Exhibit 242.

11 A (Witness reviews exhibits.)

12 UNIDENTIFIED: I'm sorry. What's the next exhibit?

13 (Counsel confer.)

14 MR. KURTZ: It's part of -- I think it's part of
15 242. However it is designated -- for people's binders is the
16 next exhibit, and it's a one-page spreadsheet.

17 THE COURT: I'm sorry. Is this in the binder you
18 gave me?

19 MR. KURTZ: It is. It's the next -- its entitled
20 "Assumption Input for Model to Variance Off Base."

21 UNIDENTIFIED: Your Honor, can we have just a moment
22 because the exhibit -- the book that he was handed says has a
23 Tab 53. We just want to verify this is really 242.

24 THE COURT: Okay.

25 UNIDENTIFIED: It's a little confusing.

1 THE COURT: Right.

2 (Counsel confer.)

3 MR. KURTZ: Your Honor, if I can explain, and I
4 think Mr. Shivakumar may be -- we had identified a larger
5 exhibit under 53 when we were submitting our joint exhibit
6 list. But in the -- just -- but it had -- although we
7 identified the Bates number and the deposition exhibit
8 number, the actual Exhibit 53 had a mislabel in its name and
9 now it's only part of this same document. So I've spoken to
10 Mr. Shivakumar this morning and we were just --

11 MR. SHIVAKUMAR: (Not identified) The short answer
12 is that Exhibit 53 should be one in the same as Sheehan
13 Deposition Exhibit 28. So Sheehan Exhibit -- Deposition
14 Exhibit 28 is also part of the joint binder, no problem.

15 THE COURT: Where?

16 (Counsel confer.)

17 UNIDENTIFIED: It's right here, Judge.

18 MR. KURTZ: It's under 242.

19 THE COURT: All right.

20 (Counsel confer.)

21 MR. KURTZ: Everybody okay?

22 COUNSEL: Yep. Yes. Yes.

23 UNIDENTIFIED: It's 242 Delphi, Bates number 17259.

24 MR. KURTZ: Uh-huh. Okay.

25 BY MR. KURTZ:

1 Q Mr. Williams, is it in front of you?

2 A Yes, it is.

3 Q And you can see that, for instance, the assumption for
4 2008 was five and a half percent in the FAS-106 report. But
5 for purposes of the steady-state projections, it's twelve and
6 a half percent, which is more than twice the inflation,
7 correct?

8 A I'm sorry. Which year are you referring to?

9 Q 2008.

10 A And which -- there's -- 2008 appears in a column heading
11 and a column row. Can you --

12 Q Well, do you understand how -- well, you saw this during
13 your deposition. Do you understand how this chart works?

14 A Well, I do, and I'd like to -- I'm happy to talk about
15 it. But can you tell me which number you're referring to?

16 Q All right. Tell us what you think the steady-state
17 projection assumption is for medical trends for the year
18 2007.

19 A In which projection year would you like me to tell you
20 that?

21 Q 2007.

22 A So the -- just to be sure I'm answering the question
23 properly, you're asking me what is the assumed rate of
24 medical increase in 2007 for the 2007 projection in a steady-
25 state projection?

1 Q Let me approach it this way.

2 Do you see the shaded box -- I'm sorry -- the shaded
3 columns in the box on the bottom?

4 A Yes, I do.

5 Q You agree that the company's steady-state projections
6 adopts the top line of the box, the shaded box, for each
7 year?

8 A The top line is one component of the steady-state
9 projection, that's correct.

10 Q That's right.

11 And in each instance it's close to twice what is shown in
12 the FAS-106 report, correct?

13 A Yes, it is.

14 Q Okay.

15 A It appears to be.

16 Q Okay. And in your opinion as an actuary, the company's
17 steady-state projections for OPEB expenses are not
18 reasonable, correct?

19 A I believe that the projections that the company made for
20 their business plan were reasonable for that purpose.

21 Q Mr. Williams, please, yes or no.

22 Do you think that the company's steady-state projections
23 for medical trend rates are reasonable or not reasonable?

24 A They are reasonable for the purpose that they're used.

25 Q Are they reasonable for purposes of a FAS-106 valuation

1 report?

2 A They are reasonable projections of what FAS-106
3 assumptions might be in the future.

4 Q Well, wait a second. You just passed on the FAS-106
5 assumptions not two weeks ago, and they're about half the
6 inflation that's contained in the steady-state projections,
7 correct?

8 A The assumptions as of 12/31/2005, that's correct.

9 Q Has anything -- are you prepared to adopt the steady-
10 state projections in a valuation report if you were to put
11 one in today?

12 A I don't believe I would, no.

13 Q Right? There's been no changes between year-end 2005 and
14 now, material changes with respect to medical trend rates,
15 correct?

16 A I don't believe so, no.

17 Q You agree with me, correct?

18 A I agree that there's been no material changes in medical
19 trend rates since two weeks ago to today, I agree.

20 Q And FAS-106 is intended to capture the best estimate of
21 the company's future projected expenses, correct?

22 A As of the snapshot date, yes, that's correct.

23 Q Yeah. And you believe that the valuation should capture
24 the best assessment or projection of future expenses, right?

25 A I believe as of the snapshot date it does, yes.

1 Q All right. And the company's steady-state projections
2 are not the best estimate of future OPEB expenses, correct?

3 A They are not the best estimate based on the current
4 snapshot, but I do agree that they are a reasonable
5 projection for the company --

6 Q Well --

7 A -- to make on for their business plan.

8 Q Are the company's steady-state projections a reasonable
9 estimate of future OPEB expenses, sitting here today while
10 you're on the stand and under oath?

11 A The steady --

12 Q Yes or no. Yes or no.

13 A I can't answer the question.

14 Q From -- you --

15 A There is not an answer to that question, sir.

16 Q Well, are you trying to draw a distinction between -- let
17 me ask you this.

18 Are the steady -- are the company's steady-state
19 projections a reasonable forecast of OPEB expenses from a
20 FAS-106 standpoint?

21 A As I think I said earlier, I believe that they are --

22 Q Yes or no.

23 A It's not a yes-or-no question, sir.

24 Q So you think that the company's steady-state projections
25 are a reasonable FAS estimate?

1 A They are reasonable projections for company business
2 planning purposes.

3 THE COURT: No, but that wasn't his question. His
4 question was: If you were doing a FAS estimate, would they
5 be reasonable?

6 THE WITNESS: The FAS estimate -- the FAS valuation
7 that I developed generates liabilities at the end of the year
8 and expenses for the next year. My report doesn't project
9 expenses out into the future, and so that's why I can't
10 answer the question, because my report doesn't cover future
11 years' potential expense. It covers the current year
12 snapshot best-estimate liability and the expense in the next
13 current year based on those at best-estimate assumptions.

14 THE COURT: So you -- well, so what -- I guess I'm
15 trying to understand that last answer. You're saying your
16 report only covers the year in which the steady-state
17 projections and the FAS estimates are basically the same?

18 THE WITNESS: That's correct.

19 THE COURT: That is, the current year?

20 THE WITNESS: That's correct. My report generates
21 liabilities as of 12/31/2005 in this case, and it generates
22 the expense for fiscal year 2006.

23 THE COURT: You haven't annualized back any
24 projections thereafter.

25 THE WITNESS: That's correct.

1 THE COURT: So you're saying that, even though for
2 year 2008 there's a projection of, you know, twelve and a
3 half percent, that didn't affect your calculation of the cost
4 --

5 THE WITNESS: That's correct.

6 THE COURT: -- for the current year?

7 THE WITNESS: That's correct.

8 THE COURT: Okay. Go ahead.

9 BY MR. KURTZ

10 Q FAS-106 requires you to project future medical trend
11 rates, correct?

12 A Yes, it does.

13 Q And you have projected future medical trend rates in the
14 FAS-106 report, correct?

15 A As of my snapshot valuation date I have.

16 Q And if you were to reissue a report today, it would set
17 forth the very same trend rate projections, correct?

18 A If my report was meant to be a snapshot valuation, it
19 would.

20 Q And you -- can you point us to any authority that would
21 suggest that different forecasts of medical trend liabilities
22 can be used for some purpose other than FAS-106?

23 A I'm not aware of any authority that deals with the kinds
24 of projections that one would develop for company business
25 plans.

1 Q So the answer is you cannot cite me to any authority that
2 would suggest your FAS-106 projections can be changed for
3 purposes of, quote, "business planning," correct?

4 A I'm not aware of anything.

5 Q And you are aware that, by utilizing the steady-state
6 projections, the debtors have estimated liabilities that are
7 far in excess of what the liabilities would be if, in fact,
8 your FAS-106 projections were adopted, correct?

9 A The projected liabilities developed by the debtor, these
10 assumptions would be larger than the projected liabilities
11 developed by my snapshot-current (sic), your assumptions.

12 THE COURT: Well, I'm sorry. I don't understand
13 that. I thought I heard you say that you used the same
14 percentage for your snapshot as where FAS -- the FAS
15 projections agree.

16 THE WITNESS: In the current year, my liabilities,
17 and I believe the liabilities underlying the first-year
18 projections, I believe they would agree.

19 THE COURT: Well, but as far as your valuation of
20 the liabilities are concerned, you go beyond the current
21 year.

22 THE WITNESS: Well, my liabilities are -- what I do
23 is I project out all of the future expected benefit payments
24 that I expect to occur under the plan, and then I discount
25 them back to develop a value as of the current year.

1 THE COURT: But -- okay. But when you do that, are
2 you using the eight percent assumption, or are you projecting
3 a growth as per the -- in terms of the trends, as per the
4 steady-state projections?

5 THE WITNESS: I'm using the assumptions that were
6 shown in our report, the ones that we discussed earlier.

7 THE COURT: Which includes the growth.

8 THE WITNESS: It includes growth, but it includes
9 growth at a declining rate over the next five or six years.

10 THE COURT: Well, but it -- when you say "growth at
11 a declining rate," the growth declines, but it's still
12 growing.

13 THE WITNESS: That's right. That's right.

14 THE COURT: As opposed to the decline in the FAS.

15 THE WITNESS: Yeah. The assumptions that I used in
16 my report, I believe, would line up with the assumptions
17 shown at the top column of this page that doesn't have any
18 shading. So those, I believe, are the assumptions -- they're
19 a little bit different, I believe, in my report. We changed
20 the ultimate assumptions from 4.9 percent for each future
21 year to five percent, so we made a modest change.

22 THE COURT: Are those the FAS assumptions?

23 THE WITNESS: Those are, in fact, the FAS-106
24 assumptions.

25 THE COURT: And you say you used those in your

1 report?

2 THE WITNESS: I did.

3 THE COURT: All right. Okay.

4 BY MR. KURTZ:

5 Q You used the assumptions that are reflected on the top of
6 the page, which work down to approximately five percent,
7 correct?

8 A I believe that's right.

9 Q You did not use the steady-state projections, which
10 worked out to something like ten and a half percent, correct?

11 A When you say "ten and a half percent," can you point me
12 to what you're referring to.

13 Q All right. Rather than continue to fence with this, you
14 did not use the steady-state projections, which were
15 materially higher than your own, correct?

16 A That's correct.

17 Q And if the steady-state projections, in fact, utilized
18 the FAS-106 forecast for medical trends rates, then
19 liabilities would be substantially decreased from what the
20 debtor is showing, correct?

21 A Liabilities in the projection years would be lower if the
22 FAS-106 assumptions were used, instead of the assumptions
23 that were, in fact, used for the steady-state projections.

24 Q So the answer is yes.

25 A I restated it just to be sure I was saying yes to

1 something I agreed with.

2 Q Okay. And, in fact, the decrease in liabilities would be
3 \$2.6 billion, correct?

4 A I don't know the order of magnitude.

5 Q Okay. Can you turn to the next exhibit, which is a
6 demonstrative that has not previously been marked.

7 MR. KURTZ: I would identify it as 247.

8 THE COURT: Wait, I'm sorry.

9 MR. BUTLER: I'd object, Your Honor. All exhibits
10 were to have been marked and presented. We haven't seen it.
11 They can't be introducing new exhibits at trial. That
12 violates the pretrial order.

13 (Counsel confer.)

14 MR. KURTZ: Your Honor, we went through this math
15 exercise this morning. What I could do is write it all out
16 on a white board. But it seems a little more expeditious to
17 walk through a mathematical equation with this witness in
18 this fashion. If people want me to labor through writing on
19 the board all the same numbers, I can do so.

20 MR. BUTLER: Counsel --

21 MR. KURTZ: Which would be permissible under any
22 trial procedures.

23 MR. BUTLER: Counsel, it would have been nice had
24 you given the objectors to your motion the work product prior
25 to trial. If you prepared it this morning, you should have

1 delivered it this morning.

2 MR. KURTZ: It was delivered to me at about 2:05,
3 which is why I was happy there was a chambers conference
4 today.

5 (Counsel confer.)

6 THE COURT: Before I deal with this exhibit, I just
7 have a question.

8 I want to make -- you're not questioning Mr.
9 Williams on his report, right? You're asking him to critique
10 the company's number -- the company's claim number and this
11 balance sheet, is that what you're doing?

12 MR. KURTZ: No. Your Honor, this witness's report
13 opines that Mr. Reese has been overly optimistic in his
14 calculations with respect to OPEB, and that it's
15 unreasonable. And so I'm going through with this witness the
16 fact that it is the company's assumptions and the company's
17 calculation of OPEB liabilities that is unreasonable, and
18 that it is overstated in accordance with his own work product
19 and the company's own work product by \$2.6 billion.

20 THE COURT: Well, let me ask you. Do you disagree
21 with Mr. Reese's use of the FAS-106 estimates?

22 THE WITNESS: No, I believe his results appear to be
23 reasonable based on the starting assumptions that he used,
24 and that those assumptions appear to match the assumptions
25 from our most recent report that he, in fact, had access to.

1 So I guess the short answer is: No, they -- I think I even
2 said in my deposition that I considered them reasonable for
3 the purposes that I thought that they were being used for.

4 THE COURT: So your criticism of his report is based
5 on other factors, besides the use of the FAS-106.

6 THE WITNESS: Yes.

7 THE COURT: All right. I mean, we can go through
8 this, but it doesn't -- he's agreeing with you on this point.

9 MR. KURTZ: Okay. I was just trying to quantify it
10 at \$2.6 billion. In fact, I will stop.

11 What I will say for the record, in case Your Honor
12 wants to be back in the record, looking for exhibits, that
13 the steady-state projection OPEB liabilities are reflected on
14 Exhibit 46; that the Hay Group baseline, which utilizes the
15 FAS-106 projections, is set forth in Exhibit 6, at Appendix
16 B-1. From there, anybody can do the subtraction and then the
17 addition.

18 THE COURT: Okay. All right.

19 (Counsel confer.)

20 THE COURT: Okay. So I don't think we need to deal
21 with this demonstrative exhibit because his areas of
22 disagreement with the Reese report are different than after
23 this issue.

24 MR. KURTZ: Well, I'm about to go into the area.
25 What I was trying to establish, Your Honor, is that Reese

1 properly demonstrated that the steady-state projections
2 overstates OPEB liabilities by 2.6 billion. I will now go
3 into the rebuttal points --

4 THE COURT: Okay. All right.

5 MR. KURTZ: -- none of which go to that issue.

6 THE COURT: Okay.

7 BY MR. KURTZ:

8 Q Okay. Before -- well, before I get into some of the very
9 specific challenges I have, one other area, which is the
10 pension contribution date, which Mr. Reese thinks was
11 substantially overstated by some \$345 million, or caused that
12 kind of a substantial overstatement.

13 I would like you to start by turning to page -- I'm
14 sorry, to Exhibit 53 in your binder.

15 A (Witness reviews exhibits.)

16 I'm sorry. There's two Exhibits 53. 53B?

17 Q Let me come and take a look at it.

18 A 53.

19 Q Yeah, it's just 53, and that's it.

20 A Thank you.

21 Q Okay. Exhibit 53 is an email that you co-authored on or
22 about October 20th, 2005, correct?

23 A Correct.

24 Q And this email sets forth Watson Wyatt's estimated
25 minimum required hourly pension plan contributions under some

1 set of assumptions, correct?

2 A Correct.

3 Q And those are the assumptions that were used by Delphi in
4 calculating pension contributions in its steady-state
5 projections, correct?

6 A Correct.

7 Q All right. Now the steady-state projections assume that
8 the company emerges on June 30, 2007, correct?

9 A I believe that's right.

10 Q And the company assumes that the pension payment is made
11 that same day, correct?

12 A I believe that that's right, yes.

13 Q Okay. But you had originally run a scenario in which the
14 company emerged on May 30, 2007, one month earlier, correct?

15 A I do recall that.

16 Q And under that scenario, the pension costs were much
17 lower, correct?

18 A Please define what you mean when you say "pension costs."

19 Q The pension contribution that would be required in 2007
20 would be much lower, correct?

21 A It was lower, yes.

22 Q Much lower, correct?

23 A That depends on what you mean by "much." Can you define
24 that term?

25 Q Let's look at what you wrote in your email. In the first

1 bullet point on the last sentence you write:

2 "Note that these 2007/2008 contributions are much higher
3 than those shown in our August email, which assumed emergence
4 in May 2007."

5 That's what you wrote, correct?

6 A Correct.

7 Q So you were certainly comfortable in the ordinary course
8 saying that the pension contribution requirements would be
9 much higher if the company delayed emergence by one month,
10 correct?

11 A Well, that was --

12 Q Is that a yes or no? You were comfortable writing that
13 or no?

14 A I wrote that for one of the two scenarios that are in
15 here.

16 Q Okay. Now both scenarios, though, include emergence on
17 June 30th, correct?

18 A They do.

19 Q And, in fact, the second alternative, which we haven't
20 even looked at yet, makes the pension contribution even
21 higher, correct?

22 A Even higher.

23 Q Than it would be under alternative one.

24 A I'd have to look at it to remind myself.

25 Q All right. I'll get back to that in a minute. Let me

1 just at least explain how this works.

2 The company has a plan year-ending of September 30 on, I
3 give a year, correct?

4 A That's correct.

5 Q And plan funding may be made within an eight-and-a-half-
6 month period of that time, correct?

7 A Under the rules of ERISA, that's correct.

8 Q And that would reduce future pension contributions,
9 correct?

10 A Correct.

11 Q And so, in order to achieve that savings on future
12 pension contributions, one would need to make a funding by
13 June 15th of any particular year, correct?

14 A All contributions count, whether they go in on June 15th
15 or June 30th.

16 Q But if the go in on June 15th, then they count towards
17 the current year, correct?

18 A That's correct.

19 Q And that saves the amount -- that decreases the amount of
20 future pension contributions, correct?

21 A It decreases the contribution in that current year.

22 Q Okay. And in this case, in order to obtain that decrease
23 in required pension contribution for 2007, the funding would
24 have to be by June 15th, correct?

25 A That's correct.

1 Q Just two weeks before the June 30th date, correct?

2 A That's correct.

3 Q And there's no way that responsible management is going
4 to delay funding for two weeks at a cost of some hundreds of
5 millions of dollars in requirements for 2007, correct?

6 A If the only effect was to cause the 2007 contribution to
7 increase, I would agree with that statement.

8 Q Well, can you give us a reason why the company would want
9 to delay two weeks in making that pension contribution at a
10 cost of hundreds of millions of dollars; can you give us that
11 reason?

12 A Well, in fact, the alternate projection that we did here
13 picked June 30 as a date -- not -- I don't believe that that
14 was the date we were told was the expected emergence from
15 bankruptcy, but rather it was a date that we selected in
16 order to illustrate the difference between making a
17 contribution on June 15th and making a contribution any time
18 after that date. So, in fact, this projection would be the
19 same whether they emerge from bankruptcy on June 30th or July
20 30th or September 30th.

21 Furthermore, as I've been hinting, the effect on
22 contributions is not just to cause the 2007 contribution to
23 go up by --

24 Q Hundreds of millions.

25 A -- a couple of hundred million dollars, but it also

1 caused -- in fact, if you accelerate the contribution before
2 June 15th, while it did cause the 2007 contribution to drop
3 by a couple hundred million dollars, it caused the
4 contribution for the next year to increase by a hundred and
5 fifty some-odd million, and the third year to increase again;
6 so that, over those three years, the contributions were, in
7 fact, the same --

8 Q Well, let --

9 A -- so it was simply a timing issue that we were
10 illustrating.

11 Q Well, let me ask you. I'm going to go back and ask my
12 same question.

13 Do you identify any legitimate reason that the debtor
14 would want to pay more money in 2007 than it was required to
15 pay in order to comply with ERISA requirements of funding?

16 A I can't answer that because I don't know enough about
17 their business plan.

18 Q Well, you've been their actuary since their inception,
19 and you've been doing this for years and years. Can you
20 think of any reason why the debtor would want to increase its
21 pension contribution requirements in 2007?

22 A It's a cash flow issue. I can't tell you what kind of
23 things that they consider when they're deciding what kind of
24 cash flow -- what kind of pension contributions and the
25 timing of those contributions should be.

1 Q Well, it's a cash flow issue, meaning that if they make
2 the payment on June 30th instead of June 15th, they have to
3 pay more money, correct?

4 A If that was the only decision, that would be correct.

5 Q Can you identify a reason that Delphi would want to have
6 to pay more money for cash flow purposes?

7 A Again, I said the June 30 wasn't the date that I
8 understood that they were planning to emerge from bankruptcy;
9 that was simply an illustrative date, that the same exact
10 pattern would occur if they emerged from bankruptcy on
11 September 30th or October 30th.

12 Q Well, you can make the pension payment at any time,
13 correct?

14 THE COURT: Counsel, this is the fifth time you've
15 asked this question.

16 MR. KURTZ: Okay. Well, no, I'm just trying to
17 point out, Your Honor, you don't have to emerge --

18 THE COURT: And you well know that in bankruptcy
19 cases, the emergence from bankruptcy is subject to a lot of
20 factors.

21 BY MR. KURTZ:

22 Q Well, let me put it this way. You, in fact, ran a
23 scenario where emergence was May 30th, correct?

24 A That's correct.

25 Q And it was the company that then asked you to delay it by

1 a mere month, correct?

2 A I don't recall whether the company asked me to delay it
3 by a mere month, or whether the company asked me to
4 illustrate the impact if the emergence was after June 15th.

5 Q Okay. Assuming that the company asked you to assess the
6 impact, you advised the company in Exhibit 53 that the impact
7 was that their contributions would be much higher, correct?

8 A I said that the contributions would be increased for that
9 year, but they would decrease for the subsequent two years.

10 Q By the way, do you understand that 2007 is an important
11 year because the company analysis is based in part on 2007
12 earnings?

13 MR. BUTLER: Objection. Where does that go into his
14 actuary report?

15 MR. KURTZ: Your Honor, I understand where this
16 witness -- he keeps suggesting 2007 doesn't mean a lot, but
17 of course it means --

18 THE COURT: Was this request tied, to your
19 knowledge, to the company's response to the request for the
20 formation of an equity committee and preparation of financial
21 projections related thereto?

22 THE WITNESS: Not to -- no, I would have had no idea
23 why they were asking me this projection.

24 BY MR. KURTZ:

25 Q After you assessed the impact of delaying a payment by

1 two weeks, and then advised the company that the impact was a
2 much higher cash contribution requirement, that's what the
3 company included in their steady-state projections, right?

4 A I believe that's right.

5 Q All right. Now one other point on this. Delphi had you
6 assume that they would not be able to obtain a waiver of the
7 requirement that missed contribution be paid immediately upon
8 emergence from bankruptcy, correct?

9 A For this particular scenario, that's correct.

10 Q And you agree that a significantly better result would
11 emerge if Delphi gets IRS approval for funding waivers for
12 2006 and 2007, correct?

13 A I think I agree with that generally, yes.

14 Q And you explain that's because, quote:

15 "The approvals would eliminate the funding spike upon
16 emergence from bankruptcy, and would provide more flexibility
17 through the end of 2007, since the waiver would presumably
18 survive such emergence."

19 Correct?

20 A I believe that's what I said, yes.

21 Q And it is possible that Delphi will, in fact, obtain a
22 waiver of their minimum funding rules, correct?

23 A It certainly might be possible, yes.

24 Q And Delphi did not ask you to model that scenario,
25 correct?

1 A No, I don't think that's correct.

2 Q Did they ask you to model that scenario?

3 A I believe that might have been one of the scenarios we
4 modeled -- we modeled, yes.

5 Q Well, do you know that? Because it hasn't been produced
6 to us.

7 A I believe that that would have been one of the scenarios
8 that we modeled, yes.

9 Q Okay. Do you know why it wasn't produced?

10 A No, I don't.

11 Q And if you ran the scenario, what it would have
12 demonstrated to the debtors was a significantly -- well, what
13 it would have shown to the debtors is no contribution
14 obligation in 2007 or 2006, correct?

15 A It would show no contribution requirement for the year of
16 the waiver, that's correct.

17 Q Which, according to you, is 2006 and 2007, correct?

18 A That would be one possible scenario, that's correct.

19 Q All right. Let me move to the specific challenges you
20 raise in your report.

21 Initially, can you confirm that your report and
22 declaration was drafted by Skadden Arps?

23 A Yes.

24 Q And I want to start by making clear that you have not
25 prepared your own calculation of OPEB and pension expenses

1 and liabilities for this motion, correct?

2 A That's correct.

3 Q Instead, you have reviewed Mr. Reese's work, correct?

4 A That's correct.

5 Q And you know Mr. Reese?

6 A I do.

7 Q You worked with him at Watson Wyatt?

8 A I did.

9 Q Mr. Reese worked on GM matters when Delphi was still a
10 part of GM, correct?

11 A That's correct.

12 Q And he is, in your opinion, a very able actuary, correct?

13 A He is.

14 Q All right. And you agree that Mr. Reese's baseline
15 calculations here are reasonable, correct?

16 A I agreed that they were reasonable for the purpose I was
17 assessing them for.

18 Q Okay. And Mr. Reese's baseline forecasts are based on
19 reasonable actuarial assumptions, correct?

20 A They're reasonable for the purpose that I assessed them
21 for, that's correct.

22 Q And they are based on reasonable actuarial assumptions,
23 correct?

24 A They're reasonable for the purpose that I expected they
25 were to be used for.

1 Q Yes or no. Are they based on reasonable actuarial
2 assumptions? If the answer is no, you're going to have to
3 identify those.

4 A They're based on reasonable assumptions for the purpose
5 that I expected they were to be used for.

6 THE COURT: No. But I mean, you're going to have to
7 explain why that's an important distinction.

8 THE WITNESS: All right. When I reviewed Adam
9 Reese's report, there was nothing in the report that
10 indicated to me that it was going to be used to develop any
11 kind of a baseline valuation of Delphi; rather, Adam Reese's
12 report focused most of its attention on the possible -- the
13 impact of possible changes to the plans, impact of possible
14 changes in assumptions. And, thus, my review of the report
15 was to the notion that I was reviewing it to see whether the
16 ultimate conclusions that he was drawing on the effective
17 changes was reasonable.

18 And so the baseline starting point for that particular
19 review would certainly be different than the baseline that I
20 might think is more appropriate if I thought it was going to
21 be used in determining the value of Delphi.

22 As a for instance, if I can just expound on that, Mr.
23 Reese's report did not include any kind of calculation of
24 contributions based on bankruptcy assumptions. He, instead,
25 started with he assumed that the company was going to make

1 ERISA minimum contributions throughout the period. And of
2 course, I knew that that was incorrect. But for purposes of
3 measuring the impact of changes in the plan, changes in
4 assumptions, I concluded that that difference probably
5 wouldn't affect my views regarding his measurement of these
6 changes.

7 Q Your concern is that, in making actuarial determinations
8 as to future expenses and liabilities in compliance with the
9 governing accounting standard, somehow it should not be used
10 in connection with a valuation exercise. Is that correct?

11 A His numbers are based on accounting standards and funding
12 rules, and he based them on funding rules that -- I think as
13 I mentioned in my deposition in a couple of areas -- I don't
14 think are appropriate to use for the purpose of valuing
15 Delphi right now.

16 Q Are you a valuation expert?

17 A I'm not.

18 Q Have you ever valued a company?

19 A I haven't.

20 Q Have you ever run a DCF analysis?

21 A I have not.

22 Q Have you ever run a comparable company analysis?

23 A I have not.

24 Q Okay. So you don't have a basis for testifying as to
25 whether or not compliance with FAS-106 is sufficient for

1 purposes of valuing a company, correct? Correct?

2 A That's correct.

3 Q And one would hope that, in making calculations under
4 strict accounting standards, filing them with the SEC and
5 publicly disclosing them, so that shareholders can make
6 decisions about the value of a company, that, in fact, those
7 would be a good basis for valuation, correct?

8 MR. BUTLER: Objection. Objection.

9 MR. KURTZ: Did you get the head nod?

10 THE COURT: No, I didn't.

11 THE WITNESS: I was reaching for my water.

12 THE COURT: What's the objection?

13 MR. BUTLER: Your Honor, he just established that
14 this witness isn't to be used for valuation purposes, then he
15 asked him a valuation question. He can't have it both ways.

16 THE COURT: Well, let me ask you the question a
17 little differently. If I think I understand your answer --
18 if I understand your answer, you're saying that the baseline
19 actuarial assumptions that Mr. Reese used -- which are right
20 out of the FAS-106, right?

21 THE WITNESS: Well, his assumptions for expense and
22 funding. So the expense assumptions are out of FAS-87 and
23 FAS-106.

24 THE COURT: So as far as base --

25 THE WITNESS: But the funding are out of our funding

1 reports.

2 THE COURT: As far as baseline assumptions are
3 concerned, there's nothing wrong with his use of those,
4 right?

5 THE WITNESS: "Those," the demographic and economic
6 assumptions, I think I'd agree with, yes.

7 THE COURT: Okay. Is there some other baseline
8 assumption that he uses in addition to those that you have an
9 issue with?

10 THE WITNESS: Yes, two areas:

11 One, again, is the assumption of timing of
12 contributions for pension funding purposes. Because, again,
13 he assumed that the pension funding contributions would be
14 made in accordance with ERISA, which is -- would accelerate
15 the contributions in comparison to the actual contribution
16 scenario that we developed, based on our understanding of the
17 bankruptcy scenario.

18 THE COURT: And are either of those out of FAS?

19 THE WITNESS: No, those aren't governed by FAS-87;
20 those are governed by -- in the first case, by ERISA, and in
21 the second -- the government funding rules, and in the second
22 case, they're governed by a combination of the government
23 funding rules and the rules that are being applied during
24 bankruptcy as to how much money Delphi can contribute to its
25 pension plans.

1 THE COURT: Okay. And is there any other baseline
2 assumption that you take issue with?

3 THE WITNESS: Yes. In developing the contributions
4 for the pension plan for the projection period, Mr. Reese
5 assumed that the pension funding law was going to be changed
6 in accordance with one of the bills that is currently being
7 debated in Congress. And, in fact, in our forecast, we've
8 assumed that the current funding law would remain in place
9 because, in my estimation, there is too much uncertainty
10 associated with trying to predict what possible changes might
11 occur because the funding laws that are being debated in
12 Congress are quite different. The President has indicated
13 that if the laws aren't -- if they pass a law that he's not
14 happy with, he may veto it.

15 And in the past, when Congress has debated changes
16 in funding rules, it's taken them a long time to get to
17 someplace, and very often they get to a set of rules that are
18 very different than what they start with.

19 THE COURT: Okay. Those are the two areas where you
20 disagree with him?

21 THE WITNESS: Those are the two areas.

22 THE COURT: Okay.

23 MR. KURTZ: Thank you.

24 BY MR. KURTZ:

25 Q On that first area, the assumption concerning the timing

1 of contributions. What's the financial impact on Mr. Reese's
2 calculations associated with that challenge by you?

3 A I haven't done a direct comparison to try and figure that
4 out.

5 Q Ah, I see.

6 On your second challenge, you talked about the funding
7 law. You understand that the law might be passed, and the
8 law might not be passed, correct?

9 A Correct.

10 Q And you noted that the President might veto, but that was
11 with respect to the bill that had special treatment for the
12 airlines, correct?

13 A I don't know that that's necessarily why he would veto
14 it.

15 Q If the law is passed, then all your assumptions would be
16 wrong that are impacted by the law, correct?

17 A If the law is passed as written, that's correct.

18 Q And since we don't know whether it will or will not be
19 passed, would you agree that Mr. Reese's assumption is
20 reasonable?

21 A No, I don't think it's reasonable to assume that a law is
22 going to change.

23 Q Okay. Even though it's passed -- a similar bill has
24 passed both the Senate and the House. Is that right?

25 A They differ in some important respects.

1 Q Okay. So then let's assume that you're right in the way
2 you speculated about the introductions of law (sic). Then
3 what would the financial impact be on Mr. Reese's
4 calculation?

5 A Well, certainly Mr. Reese's contributions would be --
6 would be very much delayed, and they would look much more
7 like the contributions that we were just discussing in my
8 report.

9 Q Your FAS-106 --

10 A Well, I'm sorry. In my -- I'm sorry.

11 Q I'm sorry.

12 A In the email we were discussing earlier.

13 Q Okay. I'm just asking for a number. What's the number?
14 I'm trying to understand this. What's the number?

15 A Well, if we look at one of the years in question, Mr.
16 Reese assumed that the contribution in 2007 would be, I
17 think, on the order of \$800 million. And I believe that my
18 projection was on the order of \$2 billion.

19 Q Can you show me where your math is on that? I don't
20 recall you doing this in any reports or declarations.

21 A That's not math. That's just recalling a number from his
22 report.

23 Q You haven't actually analyzed and tried to calculate what
24 Mr. Reese's number would be if he changed his assumption
25 about the enactment of a law, have you?

1 A I didn't -- no, I did not do that.

2 Q Okay. Let me move to the five specific challenges that
3 you raise in your report, and I'll go through this stuff
4 pretty quickly.

5 The first challenge you raise is with respect to the
6 assumption that Mr. -- by Mr. Reese under some scenarios that
7 the pension discount rate could increase by .25 percent
8 annually, from five and a half to six and a half percent,
9 correct?

10 A That's correct.

11 Q Do you agree that it is reasonable to assume that
12 interest rates may so increase?

13 A They certainly might.

14 Q All right. And in fact, the current discount rate used
15 for Delphi's pension and OPEB expense is the lowest it's ever
16 been in Delphi's existence, correct?

17 A That's correct.

18 Q And interest rates haven't been this low since the 1940s
19 and '50s, correct?

20 A I believe that's generally correct.

21 Q So it's certainly reasonable to project that discount
22 rates may rise from the lowest historical rate, correct?

23 A That's certainly one assumption one can make, yes.

24 That's --

25 Q All right. And then you offer that it is possible that,

1 if interest rates increase, there will be a resulting decline
2 in invested asset value, which may offset, at least in part,
3 some of those savings, correct?

4 A That's correct.

5 Q But an increase in discount rates does not necessarily
6 correspond to a decrease in asset value, correct?

7 A It doesn't always, that's correct.

8 Q There have been periods of time when discount rates have
9 decreased and asset values have, in fact, increased, correct?

10 A I'm sorry. There's been periods when discount rates have
11 decreased?

12 Q Yeah. And asset values have increased, correct?

13 A That certainly is true.

14 Q All right. And you certainly haven't quantified or
15 modeled the effect that a decrease in discount rate could
16 have on assets, correct?

17 A No.

18 Q Am I right or wrong?

19 A That's correct.

20 Q All right. Your second challenge is to Mr. Reese's
21 assumption that the retirement medical benefit discount rate
22 will be higher than the pension discount rate, correct?

23 A That's correct.

24 Q You understand that in the supplemental declaration Mr.
25 Reese provides no such differential, correct?

1 A I did notice that, yes.

2 Q And you understand that Mr. Reese utilized your FAS-106
3 assumption in setting the discount rates, correct?

4 A I did notice that.

5 Q And when he had the twenty-five-basis-point differential
6 that was also based on your FAS-106 report, correct?

7 A Well, which report was that based on?

8 Q Well, did -- first the debtor produced a year-end 2004
9 FAS-106 report, correct?

10 A Correct.

11 Q And in there was the twenty-five-basis-point
12 differential, correct?

13 A I believe it was.

14 Q Which was then used by Mr. Reese, correct?

15 A I believe that's -- well, it --

16 Q Then after Mr. Reese submitted a report, the debtors
17 produced the 2005 FAS-106 report, correct?

18 A That's correct.

19 Q And in that report, you had extinguished the
20 differential, correct?

21 A I didn't extinguish it.

22 Q The company had extinguished it.

23 A The marketplace extinguished it.

24 Q Okay. You reflect no more differential, correct?

25 A That's correct.

1 Q And Mr. Reese adopts your assumptions again, correct?

2 A I believe that that's correct

3 Q Okay. Your third challenge is your assertion that the
4 elimination of a jobs bank will cause an increase in
5 retirements and that Mr. Reese has failed to account for the
6 costs of such accelerated retirements, correct?

7 A I believe I said that it could cause an increase in
8 retirements, that's correct.

9 Q You certainly don't know that will happen, right?

10 A I don't.

11 Q And you certainly haven't attempted to quantify the
12 impact of any perspective acceleration or retirements,
13 correct?

14 A I have not.

15 Q In fact, you've performed no study of that issue at all,
16 right?

17 A That's correct.

18 Q And just to see how this works, some of the employees in
19 the job bank are retirement eligible, correct?

20 A I believe that they would be, yeah.

21 Q And some of the employees in the job banks are not
22 retirement eligible, correct?

23 A I don't know. I don't know the exact composition of the
24 jobs bank.

25 Q Okay. Actually, you just have no idea what the

1 composition of the jobs bank is, correct?

2 A I think that that's correct, yes.

3 Q But you know -- or at least you could know if you looked
4 at the right documents what the work force population is,
5 correct, inclusive of job banks?

6 A Yes.

7 Q And you know that Delphi accrues an OPEB liability for
8 all employees regardless of whether they're retirement
9 eligible or not retirement eligible, correct?

10 A Yes.

11 Q And if Delphi terminates the job bank, then it will
12 eliminate its actuarial liability with respect to each
13 employee that is not retirement eligible, correct?

14 A That would generally be correct, yes.

15 Q So there might be an increase in retirement costs with
16 respect to retirement eligible employees, correct?

17 A Correct.

18 Q And a decrease in actuarial liability with respect to
19 those employees that are not retirement eligible, correct?

20 A That's correct.

21 Q And you understand that approximately seventy-five
22 percent of Delphi's work force is not retirement eligible?

23 A I don't know that off the top of my head, no.

24 Q I'll tell you what. Why don't we look through -- let's
25 go back to your FAS-106 report and ask you to turn to Page 9

1 and tell us whether that reflects the number of employees at
2 large and those that are retirement eligible.

3 A Okay. I have Page 9. What was the question?

4 Q Well, can you first confirm that according to your FAS-
5 106 report there is 32,017 employees that work at Delphi?

6 A There are 32,000 hourly employees covered by this plan.

7 Q Okay. And can you further confirm that the shaded box
8 are those that are retirement eligible?

9 A With the inclusion of some portion of the people in the -
10 -

11 Q In the box.

12 A -- in the box around the two oh eight two. I believe
13 that's correct.

14 Q Let's go one step at a time.

15 Everyone in the shaded area is retirement eligible,
16 correct?

17 A I believe that that's right.

18 Q And then the box, it contains people that might be
19 retirement eligible and might not be retirement eligible,
20 depending how old they are and how long they've been there?

21 A That's correct.

22 Q And eye-balling this, or otherwise accepting my
23 representation subject to somebody doing some math later,
24 about seventy-five percent of the work force is not
25 retirement eligible, correct?

1 A Seventy-five percent of the people covered by this plan -
2 -
3 Q Yeah.
4 A -- I would -- without doing the math myself, if you say
5 you've done the math, I accept that that certainly looks like
6 it could be a reasonable conclusion.
7 Q All right. And the savings associated with the estimated
8 seventy-five percent of the work force that would result in a
9 decrease in actuarial liability more than offsets any
10 increase associated with the remaining twenty-five percent,
11 correct?
12 A Not necessarily.
13 Q You can't say that's incorrect, can you?
14 A I can't say it either way.
15 Q Okay. Your fourth challenge, you claim that Delphi will
16 be required to provide transitional benefits for current
17 retirees or employees that are retirement eligible or close
18 to being retirement eligible, correct?
19 A I said that they -- that Delphi certainly might be
20 required.
21 Q Okay. You're not an expert in labor negotiations,
22 correct?
23 A I'm not sure what that term means.
24 Q Then you must not be an expert, right?
25 A I can't answer that question.

1 Q Okay. And you don't know whether Delphi would have to
2 provide transitional benefits, right?

3 A I don't.

4 Q But you do know that in 1995 -- I'm sorry, in 2005,
5 Delphi, in fact, changed the medical retirement benefits for
6 salaried employees, correct?

7 A Correct.

8 Q And that resulted in a fifty percent savings, correct?

9 A Thereabouts. That's correct.

10 Q And that was inclusive of transition benefits, correct?

11 A Inclusive of the transition benefits that they provided
12 voluntarily to salaried employees. That's correct.

13 Q And that's precisely the assumption that's been adopted
14 by Mr. Reese, correct?

15 A I believe that that's correct.

16 Q All right. Last point. Your fifth challenge is that Mr.
17 Reese should have assumed a mass reduction in work force,
18 correct? Or maybe should have assumed that, correct?

19 A I -- yeah. I think what I said was that his projection
20 was flawed because he didn't take into account the
21 possibility that any change in the plan, particularly a plan
22 freeze or any other change, might result in a large number of
23 people retiring.

24 Q But your exact words were, quote, "a mass reduction in
25 the workforce," correct?

1 A I'm sorry. What's the -- can you read the full sentence
2 so I understand the context of what --

3 Q Well, I'll adapt to any way you want to talk about it.
4 I'm just saying you talk about a mass reduction in the
5 workforce, correct?

6 A I need to know the context of what I said --

7 Q Sure. Look at your report, which is Exhibit 12 in your
8 binder.

9 A Okay.

10 Q And turn to Page -- turn to Page 6, Subsection E, first
11 bullet point. What you say is, just so we have it right on
12 the record, is:

13 "Considering that Delphi has stated that its ability to
14 reorganize depends largely on its ability to successfully
15 transform its labor structure and costs --"

16 A I'm sorry. Could you tell me exactly where you are? I'm
17 on Page 6. I want to be sure I'm at the right place.

18 Q Sure. It's your fifth challenge, so it's under "E" and
19 it's the first bullet point. It's the last paragraph on the
20 page.

21 A Okay.

22 Q Should I start from the beginning or are we comfortable
23 picking up where I left off?

24 A No, that's fine.

25 Q "-- Hay Group should have considered a mass reduction in

1 workforce arising out of Delphi's potential decision to cease
2 certain operations."

3 A Yes.

4 Q That's what you said, right?

5 A Yes.

6 Q Now if there was a mass reduction in the workforce, then
7 Delphi's expenses would be dramatically decreased, correct?

8 A Not necessarily.

9 Q You mean if Delphi didn't have to pay its employees
10 salaries and benefits and other compensation but for
11 pensions, that wouldn't result in a savings to the company?

12 A I can't conclude that.

13 Q You can't conclude that there is a savings associated
14 with not paying employees?

15 MR. BUTLER: Judge, objection. Asked and answered.

16 THE COURT: Well, why would you not conclude that?

17 THE WITNESS: Because the -- if the mass reduction
18 in the workforce resulted in significant early retirement,
19 particularly if it resulted in the triggering of the special
20 early retirement benefits that are provided to people when
21 plants are shut down, the increase in liabilities and
22 contributions in the near term could be quite substantial.
23 And I haven't looked at that increase compared to the
24 decrease in near-term savings due to the elimination of
25 salaries to know whether there is -- what the relationship

1 might be.

2 Certainly over the long term, I'd expect that there
3 would be savings. But because of the rules of ERISA which
4 requires a very rapid pay-down of unemployment liabilities,
5 it could be in the near term there might not be any savings.

6 THE COURT: Okay.

7 BY MR. KURTZ:

8 Q Let me take that in pieces.

9 You certainly recognize that a reduction in payroll
10 constitutes a savings, correct?

11 A Yes, it does.

12 Q And under general circumstances wouldn't you also assume
13 that it costs more to pay a current employee than it would
14 cost to retire him? Under normal circumstances.

15 A I can't conclude that because of the way that ERISA
16 funding rules work.

17 Q You can't conclude that I'm wrong either, right?

18 A Without running numbers, no, I can't.

19 Q And you haven't run any numbers, right?

20 A That's correct.

21 Q You've had an opportunity to do that, but you haven't
22 done that, right?

23 A That's correct.

24 Q And you do understand that Eureka and Mr. Reese both
25 assume that the workforce will remain static, and so did not

1 account for the reduction in payroll expenses?

2 A Yes.

3 Q Okay. And, notwithstanding your objection that Mr. Reese
4 failed to assume a mass reduction in workforce, your pension
5 calculations also assume that the workforce will remain
6 static, correct?

7 A That's correct.

8 MR. KURTZ: No further questions.

9 THE COURT: Okay. I hope, sir, you've turned your
10 cell phone off?

11 UNIDENTIFIED: Yes.

12 THE COURT: If that happens again you'll be excluded
13 from the court. And anyone else whose cell phone goes off
14 will be excluded from the court. All right.

15 **REDIRECT EXAMINATION**

16 **BY MR. BUTLER:**

17 Q Mr. Williams, let's turn back your attention, if you
18 will, to I think what was marked Exhibit 70. That would be
19 in the book -- the first book that you received.

20 And that's the FAS report dated March 3, 2006. Is that
21 correct?

22 A That's correct.

23 Q And you prepared that report. Is that correct?

24 A We did.

25 Q Can you explain to the Court what relationship, if any,

1 that report has to do with the establishment of liabilities
2 in the balance sheet for OPEB?

3 A Yes. This report includes in it not just the liabilities
4 we've calculated, the present value future benefits, but also
5 it includes the accumulated liabilities that the company has
6 actually booked, which is the excess of expense books by the
7 company on their balance sheet, or on their income statement,
8 through the end of 2005 over cash benefit payments actually
9 paid by the company through that period.

10 Q I'm showing you an exhibit, Trial Exhibit 206, Mr.
11 Williams. On that exhibit there is a part of the pie that
12 says there's \$7.399 billion worth of post-retirement
13 obligations other than pensions. Are you familiar with that
14 number, sir?

15 A I believe I am.

16 Q Is that number consistent or inconsistent with your
17 report?

18 A I believe it to be consistent with my report.

19 Q So notwithstanding all of the cross-examination, Mr.
20 Williams, you believe that -- do you believe that this number
21 is properly stated?

22 THE COURT: I'm sorry. When you say "your report,"
23 which report are you referring to? The FAS?

24 THE WITNESS: Yes.

25 MR. BUTLER: I was talking about Exhibit No. 70,

1 Your Honor.

2 THE COURT: Okay. All right. Let me -- I'm sorry.
3 You had an objection?

4 MR. KURTZ: Your Honor, this witness does not
5 include anywhere in his report or declaration some sort of
6 balance sheet analysis, which is what we're now looking at.
7 He looks at the actuarial accruals, and we've addressed them.

8 That has nothing to do with balance sheet, nor does
9 it -- we even established a basis that he knows the balance
10 sheet, has looked at the numbers, other than his willingness
11 to sort of just agree with his counsel. I don't see where
12 he's got a basis for saying he knows what makes up the 7.4
13 million and -- or billion -- and that he studied it and has a
14 basis for responding beyond the scope of what his -- and I
15 didn't ask him about balance sheet questions, either.

16 So it's outside the scope of the cross and it's not
17 within his report and there's no foundation that he even
18 knows the answer.

19 MR. BUTLER: He examined him about Exhibit 70, Your
20 Honor. And that -- and, you know, asked a lot of questions
21 about the obligations the company was carrying in its
22 projections and about its financials. This is one of the
23 core aspects of this case.

24 THE COURT: Well, but he only asked him about the
25 FAS report insofar as he's talking about the baseline

1 objections for the medical projections.

2 MR. BUTLER: This is the starting point of those
3 projections, Your Honor. That's my --

4 THE COURT: Well, you can ask him about the baseline
5 -- about the medical projections, but, I mean -- and how they
6 might relate to, you know, the company's financial statement.
7 But I don't see how he can give expert testimony on something
8 he hasn't written a report on or -- and I don't think he's
9 written a report on the claim.

10 MR. BUTLER: Your Honor, he was examined about the
11 FAS-106 report.

12 THE COURT: No, no. You can ask him -- you can ask
13 him about what he -- the specific things he was examined on,
14 which wasn't the whole report. It was just the baseline
15 medical costs -- medical trend projections and how they
16 relate to the difference between the projected OPEB claim
17 that Mr. Reese has and whether that projected claim of Mr.
18 Reese's is inaccurate.

19 So I think you have to get there in a little -- in
20 baby steps and you may not be able to get all the way there,
21 in other words.

22 MR. BUTLER: All right. Your Honor, let me then
23 move to the second line of redirect relating to this because
24 there was a great deal of cross-examination on this point.

25 BY MR. BUTLER:

1 Q Mr. Williams, are you aware of whether there were
2 different assumptions used in the steady-state projections
3 than in the Watson Wyatt Report, Exhibit 70, with respect to
4 baseline trends?

5 A Yes.

6 Q Are you aware of what those differences are?

7 MR. KURTZ: Objection. Your Honor, if this has to
8 do with medical rate trends, terrific; if it doesn't, it's
9 beyond the scope of his report, it's beyond my cross-
10 examination.

11 THE COURT: Well, except you asked him about the
12 basis for the difference between this number, the 7.33-
13 billion-dollar number, and Mr. Reese's overall number.

14 MR. KURTZ: No. No, I --

15 THE COURT: Well, wasn't that what your
16 demonstrative exhibit was all about?

17 MR. KURTZ: No. But let me explain.

18 What I asked him about was the difference -- and I
19 have no problem with redirect on it -- between Mr. Reese's
20 baseline OPEB liability forecast, and that's contained in the
21 steady-state projections, I don't think anybody has connected
22 that to the blue claim on that sheet.

23 Absolutely, I went into the OPEB liabilities. But I
24 don't believe anyone has connected that to the 7.3 I don't
25 think that's what it adds up to, although I could go through

1 the --

2 THE COURT: So, I'm sorry. Your comparison in your
3 demonstrative was between what and what?

4 MR. KURTZ: Between OPEB liabilities for 2006
5 through 2010, as calculated by Mr. Reese and as calculated in
6 the steady-state projections.

7 THE COURT: Okay. Well, don't the steady-state
8 projections lead to this -- I mean, that's the question Mr.
9 Butler was asking. Do the steady-state projections lead to
10 this number or not?

11 MR. KURTZ: Well, if he says do they lead to the
12 OPEB liability number reflected in the steady-state
13 projections, I have no problem. I'm not --

14 THE COURT: Okay.

15 MR. KURTZ: -- convinced that that's the same number
16 as what's in --

17 THE COURT: Well, let's ask him that.

18 MR. BUTLER: Your Honor, I was actually -- I told
19 you I'd go on to my second line of questioning. I was
20 dealing with -- and just so the record can be clear here,
21 there is a difference between the liabilities on the balance
22 sheet at any given period of time and the OPEB expense that's
23 expensed against the income statement at any period of time.
24 All right? One is a balance sheet; one is an expense. One
25 is an income; one is an income item.

1 And the line of questioning which I was moving into
2 which I believe was the line of questioning counsel was
3 involved in was what was being expensed based on actuarial
4 projections and the company's business projections what was
5 being expensed.

6 THE COURT: Okay. So it doesn't relate to the --

7 MR. BUTLER: No.

8 THE COURT: Fine. Then you can answer that
9 question.

10 MR. BUTLER: Okay.

11 BY MR. BUTLER:

12 Q So I believe the question I was asking you before the
13 objection was: Are you aware of whether there was a
14 difference between the assumptions used in the steady state
15 with respect to annual OPEB expense expensed against the
16 income statement and that that would be derived by applying
17 forward-looking trend line in the Watson Wyatt Exhibit 70?

18 A Yes, I am aware of the difference.

19 Q Okay. Do you know why there is a difference?

20 A Yes, I do.

21 Q Can you explain to the Court what that difference is?

22 A Yes, I can.

23 The main part of it -- the main difference, the main
24 driver is the fact that in the company's business plan
25 projections, the company elected to assume that in each year

1 during the business planning period the company would need to
2 move forward the period over which the medical trend is
3 assumed to decrease essentially to push out trend one year in
4 each year of the projection. And I believe that they did
5 that because of what they saw had, in fact, happened in the
6 past with respect to comparing experience with -- that
7 actually occurred with the assumptions in our various
8 valuation reports in the past.

9 Q And what, Mr. Williams, had happened in the past?

10 A In fact, in each year in the past five years medical
11 trend was higher than that we had assumed in our report. And
12 so, in fact, in each year in the past -- in each year since
13 Delphi spun off from GM, we, in fact, changed the medical
14 trend assumptions at the end of the year to push out trend
15 another year or so in much the same fashion that the company
16 has, in fact, included in their steady-state business plan.

17 Q So in prior year, had the company, for budgeting
18 purposes, adopted your trend rates that were in your prior
19 FAS-106 reports, how would the company have ended up at the
20 end of the year compared to budget?

21 A They would have been -- they would have found themselves
22 surprised. They would have found that they had not budgeted
23 enough expense for the subsequent year.

24 Q And how did they remedy that?

25 A I believe that their business planning process has always

1 included this assumption that the medical trend rates would
2 have to be pushed off in each future year during the
3 budgeting period.

4 Q Let's now move to Exhibit I believe it was -- I think
5 it's 242.

6 A I'm sorry. Can you direct me to which binder that's in?

7 Q I will in just one moment.

8 A Okay.

9 Q I want to make sure I get the right document reference.

10 A Sure.

11 (Counsel confer.)

12 THE COURT: It's Exhibit 53A in the book that
13 Appaloosa's lawyer gave you.

14 THE WITNESS: Oh, the same --

15 THE COURT: Yeah.

16 THE WITNESS: That binder? Okay.

17 MR. BUTLER: Just one moment.

18 (Counsel confer.)

19 BY MR. BUTLER:

20 Q It is part of Exhibit 242. In the short book you've got
21 it says "53" on it, but it's Exhibit 242. And I'm referring
22 to the email that is dated October 20, 2005.

23 A Okay.

24 Q Do you have that document in front of you, sir?

25 A I have that.

1 MR. KURTZ: For the record, it's in both places.

2 BY MR. BUTLER:

3 Q Mr. Williams, did you prepare this email?

4 A I did.

5 Q And, again, on what date was this transmitted to the
6 company?

7 A I believe that we sent it to them on the date of the
8 email, which is October 20th.

9 Q Had you had prior discussions with the company about the
10 contents of the email before preparing it?

11 A I'm sure that we did, yes.

12 Q Do you have any recollection as to when the first time
13 Appaloosa made a demand on the United States Trustee for an
14 equity committee in this case?

15 A No, I have no idea.

16 Q Would it refresh your recollection if I told you it was
17 in November of 2005?

18 A I wouldn't know that. No one -- it wasn't anything that
19 I needed to know to do my work.

20 Q Did you ever have any discussions with the company --
21 prior to the filing of this contested hearing, did you have
22 any discussions with the company regarding the trustee motion
23 -- or the motion -- excuse me, the equity committee motion?

24 A Not that I can recall, no.

25 Q Now I'd like you to, if you would, Mr. Williams, in your

1 own words to explain to the Court without my interruption
2 what this email and its attachments were purported to --
3 intended to do.

4 A This email was intended to provide the company with an
5 alternative forecast of contributions based on a scenario
6 posed to me, which is that they -- that the company would
7 emerge from bankruptcy after June 15th instead of before June
8 15th. And I picked the date of June 30th as a simplifying
9 assumption. I could have picked a date any time in the
10 second half of the year and come up with the same projections
11 as I did here.

12 And the intention of this was to show the company, in
13 fact, what would happen, which is that by delaying
14 contributions after June 15th, that would increase the
15 contribution requirement during 2007, but decrease
16 contributions in 2008 and 2009 and, in fact, over that three-
17 year period the total contributions end up being virtually
18 the same.

19 Q I'd like you to look at Trial Exhibit 10. It's in that
20 same binder. It's the supplemental of direct testimony and
21 declaration of Mr. Reese. I'd like you to look at Paragraph
22 12 of that declaration.

23 Mr. Williams, in that paragraph Mr. Reese testified that
24 if Delphi emerged from bankruptcy on June 15, 2007 instead of
25 the June 30th date currently being suggested, the company

1 would have, quote, "saved more than \$340 million."

2 Do you agree with Mr. Reese's testimony?

3 A I do not.

4 Q And can you tell the Court why you disagree with the
5 testimony?

6 A I disagree because this implies that the reduction in
7 contribution in 2007 would never have to be made up in the
8 future. And, in fact, as I found in my prior work, any
9 reduction of contributions in 2007 would be offset by an
10 increase in contributions in 2008 and 2009.

11 MR. BUTLER: No further questions, Your Honor.

12 THE COURT: Okay.

13 MR. KURTZ: I'll be very brief, Your Honor.

14 **RECROSS-EXAMINATION**

15 **BY MR. KURTZ:**

16 Q You were asked about the reason that the company's
17 steady-state projections were nearly twice what the FAS-106
18 report reflected. And you talked about past performance.

19 You were well aware of how your past projections tracked
20 against actual performance at the time that you participated
21 in the completion of the FAS-106 report, correct?

22 A That's correct.

23 Q And the company was -- and let me stop there.

24 And the FAS-106 report sets forth your best estimate of
25 the future OPEB liability, correct?

1 A They set forth our best estimate as of that date --

2 Q Yes.

3 A -- of the OPEB liability.

4 Q And the company was well aware of how your projections
5 had tracked against actual performance at the time that it
6 completed the FAS-106 report, correct?

7 A I believe that they were.

8 Q Okay. And that was the company's best -- what's set
9 forth in FAS-106 report, which is about half of the inflation
10 set forth in the steady-state projections, was the company's
11 best estimate of future OPEB liabilities, correct?

12 A Their best estimate as of the snapshot date, that's
13 correct.

14 Q All right. And the only other thing I want to talk to
15 you about is you just mentioned something about your role in
16 selecting a June 30th emergence date and what it was all
17 about and it could have been any date. And I just want to
18 read you the following question and answer from Mr. Sheehan's
19 deposition and you can tell me whether this is accurate.

20 "Question --"

21 And this is on Page 20, Lines 7 through 15.

22 "Question: Who decided to make the June 30, 2007
23 emergence date?

24 "Answer: The management of the company, together with
25 its legal advisors. We believe that that is a reasonable

1 assumption based upon the timing that we have considered for
2 being able to deal with the issues that need to be dealt with
3 in this reorganization process."

4 Does that sound right to you?

5 MR. BUTLER: Objection. How can this witness
6 testify as to Mr. Sheehan's deposition?

7 MR. KURTZ: I'm asking about the content. Does that
8 sound right to this witness?

9 THE COURT: Was there any discussion with you with
10 regard to the company's choice of an emergence date?

11 THE WITNESS: No, there wasn't.

12 THE COURT: Okay.

13 BY MR. KURTZ:

14 Q Do you have any reason to think you better know why the
15 June 30th emergence date was selected than Mr. Sheehan?

16 A No.

17 Q In fact, would you agree Mr. Sheehan would be much closer
18 to that kind of information?

19 A Yes.

20 Q And so we are back to having a pension contribution made
21 on a mere two-week delay, correct?

22 A That would be correct.

23 Q Causing an expense in 2007 of several hundred million
24 dollars, correct?

25 A That's correct.

1 Q That could otherwise be avoided, correct?

2 A That's correct.

3 MR. KURTZ: No further questions.

4 THE COURT: Okay. You can step down, sir.

5 THE WITNESS: Thank you.

6 (Witness excused.)

7 MR. BUTLER: Your Honor, the debtors would like to

8 present their final rebuttal witness for cross-examination.

9 That would be Mr. David L. Resnick, who -- from the

10 Rothschild firm, who is the debtors' principal investment

11 banker and financial advisor in these Chapter 11 cases with

12 respect to the documents that have been admitted in evidence,

13 Exhibits -- or, excuse me, that have been presented for

14 admission to evidence subject to the Daubert motion. This

15 would be Exhibits 13, the declaration of Mr. Resnick, and

16 Exhibit 14, the Rothschild report.

17 THE COURT: Okay.

18 MR. ARAGON: Your Honor, of course we'd like to

19 argue our motion if we could.

20 THE COURT: All right.

21 MR. ARAGON: May it please the Court, Rudy Aragon

22 from White & Case.

23 Your Honor, we have filed this motion to exclude the

24 expert rebuttal report and declaration of Mr. Resnick based

25 on the teachings of Federal Rule of Evidence 702 as

1 articulated by the Daubert decision. Under the rule and
2 Daubert:

3 "An expert opinion that is not the product of
4 reliable principles and methodologies ought to be
5 stricken."

6 Now in our case we have presented reliable
7 methodologies and applied them to come up with an enterprise
8 value of the restructured debtor. We came up at the end of
9 the day with equity value of between 2.9 billion and 6.6
10 billion for the end of 2006 and between 2.4 and 6.2 billion
11 at the end of 2007.

12 By contrast, debtors' expert Mr. Resnick has
13 admitted that he has done no such analysis, even though he
14 very well knows the traditional methods that are used to do
15 this. He has done it before, but he didn't do it now.
16 Instead, he used two utterly unreliable methodologies that
17 have nothing to do with whether or not in the future, whether
18 it's 2006 or 2007, there is going to be recovery for equity
19 when the debtors emerge from bankruptcy.

20 First, what Mr. Resnick did is he used a current
21 market trading as a methodology. But it's totally improper
22 in our view and unreliable to determine if the company when
23 it emerges from bankruptcy, at the time of emergence, whether
24 or not that equity will be in the money using that
25 methodology.

1 In the first place, post-filing trading of debtors'
2 securities are neither accepted nor reliable methods for
3 valuing a company upon reorganization. We asked Mr. Resnick
4 that question in his deposition:

5 "Question: This is with respect to the current
6 market trading. Do you know --"

7 This is on Page 217. It's in our motion. Well,
8 maybe it isn't. 217, Lines 6 through 14.

9 "Question: Do you know of any learned treatises or
10 publications on valuation that use or refer to security
11 market trading as an appropriate method for determining the
12 value of an ongoing enterprise?"

13 And the answer was:

14 "We weren't using these methodologies to determine
15 the value of an ongoing enterprise. We were using them to
16 assess the company's insolvency."

17 And these methods he's referring to are the current
18 market trading and the insolvency test that I'll speak about
19 in a minute.

20 So not only are they not reliable, Your Honor, but
21 they don't measure the future. The test is not what the
22 circumstance of the company is today. We've already seen
23 there are going to be lots of changes to the company over the
24 next few months.

25 THE COURT: Do you have any case law authority in

1 the context of a motion for appointment of an equity
2 committee that stands for the proposition you just stated?

3 MR. ARAGON: Excuse me, Your Honor?

4 THE COURT: Do you have any case law authority in
5 connection with the motion under 1102(a)(2) for the
6 proposition you just stated, that I have to do a projected
7 insolvency analysis as opposed to, among one of the many
8 factors to consider, determine whether the debtor appears to
9 be insolvent, in Judge Lifland's phraseology?

10 MR. ARAGON: Our view, Judge -- you're talking about
11 the Williams decision, Your Honor?

12 The Williams decision --

13 THE COURT: I'm not asking about the Williams
14 decision. I'm asking if you have any authority to the
15 contrary.

16 MR. ARAGON: I don't have any authority to the
17 contrary --

18 THE COURT: All right. Okay.

19 MR. ARAGON: -- although we've distinguished we
20 believe the Williams decision in our reply brief.

21 THE COURT: All right.

22 MR. ARAGON: And our position on Williams, Your
23 Honor, of course, is that there is a circumstance where
24 equity was clearly out of the money under any analysis. So -
25 -

1 THE COURT: That wasn't -- I'm just asking you --
2 this is about the fifth time you've said that I have to do an
3 emergence valuation now, not just today, but yesterday, as
4 well. I just want to know whether there's any authority for
5 that.

6 MR. ARAGON: Your Honor, I don't have any specific
7 case that tells me that that's the case. But I do have the
8 notion that when, at the end of the day, we conclude whether
9 or not equity is going to be in the money, we have to make
10 that assessment and that evaluation. Is there going to be a
11 likelihood that equity will be in the money?

12 And it's clear that with respect to market trading,
13 and it's typical and indicative -- it's clear what's
14 happening in market trading, that this is typical for Chapter
15 11 filings. Regardless of ultimate recovery for
16 shareholders, it is very typical that equity and securities
17 trade at a discount.

18 And we've pointed out in our motion various other
19 cases where -- which underscores the fickle nature of the
20 market as the basis for solvency certainly at the end of the
21 case. And the Mirant case is the perfect example. And I
22 think the Mirant case I suppose would be one --

23 THE COURT: I read your brief.

24 MR. ARAGON: All right. Now the debtors in their
25 motion, Your Honor, refer to the Loral decision (phonetic),

1 and I looked at the opinion on that. And they basically
2 state that the Court considered the book value of the debtor
3 there and its public securities trading. And the implication
4 they seem to want to draw is that the Court bless this as a
5 way to determine if equity was in the money.

6 But I have the transcript where Your Honor said the
7 following on Page 131, starting at Line 19:

8 "Based on both the book value of the debtors from
9 their publicly filed SEC reporting as well as the agreed-upon
10 range of trading prices which were the only evidence of value
11 offered by the movants, the common shareholders are
12 substantially under water from anywhere between \$230 million
13 on a high end to six hundred and twenty or more on a low end"
14 -- "620 million or more on a low end. As I noted at the
15 hearing in September, both book valuations and trading
16 valuations, that is securities trading valuations, have their
17 weak elements. And it's been my experience that book
18 valuation in a company like this has often been overstated,
19 whereas we all recognize that the trading valuations are far
20 from accurate."

21 So, in effect, it's really the opposite of what
22 they're saying. In this case, in the Loral case, it was
23 actually the movant that came in with this attempt to have
24 insolvency and market trading as the basis for the conclusion
25 that somehow equity is in the money.

1 We have done an evaluation, Your Honor, which is
2 based on the ongoing business of the company and we do think
3 at the end of the day it is the future of the company that is
4 critical.

5 The second faulty methodology used in Mr. Resnick's
6 report is called accounting insolvency. In our view, it's
7 even more unreliable and inappropriate under Daubert.

8 Mr. Resnick basically performs a simple balance
9 sheet test. But he offers no authoritative support for this
10 method. We asked him the question, this is from Page 222,
11 Line 20, going into Page 223 question:

12 "Identify any authority that supports this kind of
13 evaluation for post-structuring entity. This is the balance
14 sheet test."

15 Mr. Stringer objected.

16 "Question: You can answer.

17 "Answer: It doesn't really make sense for a post-
18 restructured company. The question is for a company in
19 Chapter 11, is it solvent. And one of the standard tests to
20 look at, the balance sheet, it's not determinative. But it's
21 a test: Do the liabilities exceed the assets?"

22 And it's not surprising that he would say that, Your
23 Honor. Such a method does not take into account the earning
24 potential of the company which is the key, in our view, to
25 the future value of a restructured company.

1 And Mr. Resnick himself actually admitted that. In
2 his deposition he said -- I asked the question:

3 "Do you know if this test of accounting insolvency,
4 which is really just a balance sheet test, has ever been
5 accepted by the Court as an indicator of value for a
6 restructured company?"

7 And Mr. Resnick answered:

8 "It's irrelevant with respect to a restructured
9 company."

10 In short, to be reliable, Your Honor, a methodology
11 for determining the restructured value of a company to assess
12 whether equity is in the money must take the future into
13 consideration. I understand your question. I believe Mirant
14 is one answer. There are probably others.

15 But, as the Court stated in Mirant, quote:

16 "The Court has found in numerous opinions support
17 for valuation of a Chapter 11 debtor through the use
18 of the DCF method and the comparable method. The
19 Court finds these methods of valuation the most
20 likely to ensure that Mirant Group is valued based
21 on the worth of its future ability to produce
22 income."

23 This type of analysis that was done by the debtors,
24 Your Honor, doesn't take into account the company's ability
25 in the future to produce income. That's what the Appaloosa

1 experts did. That's what should have been done. The two
2 methodologies, which is the solvency test and the market
3 trading test, are utterly unreliable for purposes of
4 determining whether or not equity will be in the money in
5 this case and under Daubert they should be stricken.

6 THE COURT: Okay.

7 MR. BUTLER: Your Honor, what Mr. Aragon chooses to
8 ignore are the two seminal cases in this district for the
9 purpose of 1102. I'm not talking -- this isn't a
10 reorganization hearing. This isn't a confirmation hearing.
11 But for 1102 what are factors that have been accepted in this
12 district as factors that a Court will consider?

13 We can argue later on what's dispositive and
14 everything else. What are both factors?

15 Both Judge Lifland and Williams and Your Honor in
16 Loral recognized that the market test and balance sheet tests
17 were factors. What weight we should put on them in this case
18 I'm prepared to argue at closing argument. But they -- but
19 to suggest that Daubert -- that the Daubert rule would cause
20 these not to come in to the evidentiary record, there is no
21 case law, and Mr. Aragon cited no case law, to support that
22 view.

23 He wants this Court instead to make a novel ruling,
24 a ruling of first -- of, really, first instance in this
25 district that, quite to the contrary, he wants you to in some

1 respects overrule Loral and overrule Williams and say that as
2 a matter of law, that these tests and these factors are so
3 unreliable as they can't be evaluated by Your Honor in the
4 context of 1102.

5 There is no basis in their motion for that. There
6 is no basis in the law of this district or the law of this
7 circuit for that proposition.

8 And Your Honor has already acknowledged, and our
9 papers already go into, there is absolutely no obligation for
10 a rebuttal witness at this stage in defending against a -- in
11 rebutting an 1102 motion for us to do a reorganization
12 enterprise valuation. There is no case law to that support
13 and there's no rules. So we, Your Honor, would ask you to
14 deny the motion and permit the testimony to go forward.

15 THE COURT: Well, as far as Mr. Resnick's
16 declaration is concerned, in respect to the trading prices, I
17 mean, he basically just reports that he got them off of
18 reliable sources for trading prices, correct?

19 MR. BUTLER: Yes. He is the one who's provided --
20 he's the one who went and did the research and reported on
21 that, and then was deposed as to those matters.

22 THE COURT: I mean, basically, anyone with access to
23 those market reporting devices could have done that, right?

24 MR. BUTLER: Right. And we chose to use our
25 investment banker. That would be the typical source of that

1 in a case would be to have your investment banker go forward
2 and provide that information to the Court.

3 THE COURT: Okay. And, similarly, with regard to
4 the company's balance sheet, that's actually reflective of
5 the operating statements on file with the --

6 MR. BUTLER: It's reflective of the operating
7 statements, Your Honor. It's also -- Mr. Resnick addressed
8 the -- in his report, I think provided a perspective as to
9 both of those tests.

10 And I would also point out that Mr. Green, on cross-
11 examination yesterday on behalf of Appaloosa, acknowledged
12 that Appaloosa has no quarrel with the GAAP nature or the
13 accuracy of these financial statements.

14 THE COURT: Okay.

15 MR. BUTLER: And so, I mean, Your Honor, I think it
16 comes in as evidence. All we're trying to do here is argue
17 should he be allowed to testify and should this be -- and
18 should this evidence come into the record.

19 And I -- you know, I can't imagine, given Williams
20 and Loral who recognized both of these as factors, why we
21 wouldn't be permitted to use this as rebuttal evidence.

22 THE COURT: Okay. Are you saying that, Mr. Aragon,
23 that this is not evidence, admissible evidence?

24 MR. ARAGON: Your Honor, we're saying that the
25 methodologies are wrong and, therefore, it's an opinion.

1 We're saying the opinion should be excluded. It may be
2 evidence, but it's opinion evidence. And under 702 you've
3 got to have more than just --

4 THE COURT: What opinion?

5 MR. ARAGON: The opinion of the expert that this is
6 the appropriate method -- that these methodologies speak to
7 whether or not equity is going to be in the money at the end
8 of the day upon a restructured company.

9 They just don't speak to that point. They speak to
10 today. They're looking at a snapshot in time now.

11 THE COURT: Okay. All right. I have in front of me
12 a motion relying on the Supreme Court's Daubert opinion
13 seeking the exclusion of Mr. Resnick's declaration and
14 related report and his testimony on the grounds that it's not
15 sufficiently reliable for purposes of this motion.

16 I find that the motion should be denied and that it,
17 frankly, to me willfully reflects -- it reflects the willful
18 shutting of the eyes by Appaloosa to the appropriate standard
19 by which the Court reviews a motion for the appointment of an
20 equity committee and I suppose was done as a matter of
21 rhetoric, but it is not appreciated in any respect by the
22 Court.

23 The use of balance sheet information and trading
24 values is well-established in this Court and elsewhere. The
25 extent to which it is used and the extent to which it is not

1 probative is well-established in this Court and elsewhere.
2 And to effectively say that it should be excluded is in
3 essence to rewrite the legal precedents in a motion in which
4 the movant acknowledges that there is no contrary legal
5 precedent.

6 The use of this information is one factor in the
7 Court's consideration. The law is very clear, and I have
8 been very clear since the start of my involvement in this
9 matter several weeks ago in connection with discovery, what
10 type of evidentiary hearing this would be. And I suppose
11 Appaloosa thought there was some value in this in some way.
12 I fail to see it. So it's denied.

13 MR. BUTLER: Your Honor, we would then call Mr.
14 Resnick for cross-examination with respect to Trial Exhibits
15 13 and 14.

16 **DAVID L. RESNICK, WITNESS FOR THE DEBTORS, SWORN**

17 THE COURT: Would you spell your name for the
18 record, please?

19 THE WITNESS: Yes, Your Honor. David Resnick, R-e-
20 s-n-i-c-k.

21 **CROSS-EXAMINATION**

22 **BY MR. ARAGON:**

23 Q Good afternoon, Mr. Resnick.

24 A Good afternoon.

25 Q You're not a licensed CPA, are you?

1 A No, sir.

2 Q You're employed by Rothschild, Inc., correct?

3 A Correct.

4 Q What is Rothschild, Inc., sir?

5 A Rothschild, Inc. is an investment banking firm.

6 Q And you're a managing director of that firm?

7 A Yes.

8 Q And a managing director at Rothschild is similar to a
9 partner at a law firm. Isn't that correct?

10 A Correct.

11 Q And on May the 1st, 2005, Delphi engaged Rothschild, in
12 particular you, as financial advisor and investment banker,
13 right?

14 A Yes.

15 Q And you're compensated with a salary and a bonus from
16 Rothschild, correct?

17 A Yes.

18 Q So if Rothschild makes a profit in this engagement with
19 Delphi, you'll share in that profit. Is that correct?

20 A I will receive a bonus, hopefully, that will be
21 reflective of the firm's profits for the year.

22 Q And in its work for Delphi since May the 1st of this past
23 year, Rothschild is billing at a rate of \$250,000 per month,
24 correct?

25 A Correct.

1 Q And Rothschild also receives a fifteen-million-dollar
2 completion fee. Isn't that correct also?

3 A If so awarded by the Court.

4 Q And you get this fifteen-million-dollar completion fee if
5 so ordered by the Court if there is a successful
6 restructuring, reorganization or some other transaction as
7 defined in your engagement letter with Delphi. Is that
8 correct?

9 A Yes. Rothschild receives it, not me.

10 Q Okay. The company which you're a partner?

11 A Correct.

12 Q And Rothschild gets that fifteen-million-dollar
13 completion fee regardless of whether or not there's any
14 recovery for equity in this case. Isn't that right?

15 A "Successful reorganization" is defined, in my view, as
16 maximizing value for all stakeholders.

17 Q Now even before your engagement with Delphi, members of
18 Rothschild had worked with Delphi's CEO Steve Miller, right?

19 A Correct.

20 Q And since this engagement, you yourself have worked
21 approximately two-thirds to seventy-five percent of your time
22 on the Delphi engagement. That is since May the 1st, 2005,
23 right?

24 A Approximately, yes.

25 Q And you've been working very closely with management from

1 Delphi, right?

2 A Yes.

3 Q You've formed friendships with some of those senior
4 managers at Delphi working with them, right?

5 A We spend a lot of time together.

6 Q So you formed friendships with them. You enjoy their
7 company?

8 A For the most part.

9 Q I won't ask you which -- I won't ask you which ones.
10 But you've developed friendships with these people?

11 A Yes.

12 Q And, of course, these are the very people that are
13 opposing this motion, right?

14 A The company is opposing the motion along with I think
15 every other stakeholder in this matter, yes.

16 Q There are other shareholders who have come forward and
17 support this motion besides Appaloosa. Isn't that right?

18 A I don't know.

19 Q So even though you've been financial advisor and
20 investment banker for Delphi since May the 1st, 2005, even
21 though you've spent the majority of your time working with
22 Delphi and its people since that time, even though your firm
23 will get a fifteen-million-dollar completion fee at the end
24 of the day, even though your firm is making \$250,000 a month
25 working with Delphi, and even though you've become friends

1 with some of the members of Delphi's senior team, you think
2 you can sit on that stand and provide unbiased independent
3 opinions to oppose this motion?

4 A I do. I've done so for twenty years to date in other
5 matters.

6 Q You're not influenced by this bankruptcy, or by the fact
7 that at the end of this bankruptcy Rothschild stands to make
8 a lot of money?

9 A I don't think I'd continue to be retained if people did
10 not find that I was an objective credible investment banker
11 in the restructuring field.

12 Q Now, sir, in reaching your conclusions and opinions as
13 reflected in your declaration and expert report, it's
14 correct, is it not, that neither you nor anybody else in
15 Rothschild has performed an enterprise valuation of Delphi?

16 A That's correct.

17 Q Now it's true, is it not, that there are traditional
18 investment banking methodologies used to determine the value
19 of a company?

20 A Yes.

21 Q And they are the discounted cash flow analysis, the
22 comparable public companies analysis, and a transaction
23 comparable analysis, correct?

24 A Correct.

25 Q In fact, those are the three methodologies that you

1 identified in your deposition when I asked you that question.
2 You remember that?
3 A Yes, I do.
4 Q Now have you or Rothschild, or anybody at Rothschild,
5 performed any discounted cash flow analysis of Delphi?
6 A Not at this time.
7 Q And you haven't performed a comparable public companies
8 analysis either, have you?
9 A Not at this time.
10 Q And nor have you or Rothschild performed a transaction
11 comparable analysis. Isn't that correct?
12 A Not at this time.
13 Q So, in coming to your conclusions and opinions, neither
14 you nor Rothschild have performed any of the traditional --
15 what you call traditional investment banking methodologies to
16 determine the value of the debtors, right?
17 A I believe it would not be appropriate to do that at this
18 time. That's correct.
19 Q You've done in the past for other companies a number of
20 business valuations in your career, have you not?
21 A I have.
22 Q But none for Delphi?
23 A Not at this time.
24 Q Okay. Well, let's discuss what you have done starting
25 with your solvency analysis.

1 According to Section 3 of your report, you reviewed
2 Delphi's September 30, 2005 10-Q and the January 31, 2005
3 monthly operating report that was filed with the Court to
4 determine that Delphi was insolvent. And that's what you
5 call your "test of accounting insolvency," correct?

6 A Correct.

7 Q Now you know, sir, do you not, that Delphi declared a
8 dividend on June 22nd, 2005?

9 A I do.

10 Q In fact, you were at the meeting of the board of
11 directors on that date, June 22, 2005, when the board of
12 directors of Delphi voted in favor of that dividend, right?

13 A Correct.

14 Q And you know, do you not, sir, that that dividend was
15 actually paid on August the 2nd, 2005?

16 A Yes.

17 Q Was Delphi solvent at that time, that is when the
18 dividend was paid on August the 2nd, 2005?

19 A I don't know. I wasn't asked to assess solvency on that
20 date.

21 Q In fact, you weren't asked to assess solvency until
22 December of 2005. Isn't that right?

23 A That's correct.

24 Q And prior to that time, you had not formed a view as to
25 whether or not Delphi was solvent, right?

1 A That's correct.

2 Q And when you finally did do an analysis of whether or not
3 Delphi was solvent, you basically looked at the balance sheet
4 current as of that time when you made the determination in
5 December of 2005, right?

6 A No. I looked primarily at the trading prices of other
7 Delphi securities in the market, principally the unsecured
8 debt and the trade claims, in addition to considering the
9 balance sheet.

10 Q So you looked at both those?

11 A Correct.

12 Q But you looked at the balance sheet?

13 A I did.

14 Q We'll get to the market trading in a bit. Okay.

15 And now in connection with your report you're looking at
16 Delphi's balance sheet, of course, and also market trading to
17 conclude that Delphi -- that, excuse me, the shareholders
18 will be out of the money, correct?

19 A Correct.

20 Q Now isn't it true, sir, that your test of solvency, which
21 is really just a balance sheet test, is irrelevant with
22 respect to a restructured company?

23 A For the purposes of determining reorganization value at
24 the end of the case, that's correct.

25 Q And it's true, sir, is it not, that you cannot identify

1 any authority that supports your balance sheet test to
2 evaluate a restructured company?

3 A I think I mentioned in my deposition that for purposes of
4 looking at insolvency, considering the balance sheet and
5 whether or not the company is insolvent for accounting
6 purposes as well as the market trading prices is in my
7 experience very typical and they are factors that Courts have
8 looked to in the past for determining solvency.

9 Q I asked you about any written treatises and you couldn't
10 identify any of those, could you, sir?

11 A You asked if I could remember a statement and a treatise
12 and I said I could not at the time, that's correct.

13 Q And in your expert report, you identified just one
14 treatise. That was McKinsey (phonetic), right?

15 A Correct.

16 Q And that didn't have anything about looking at the
17 insolvency or market trading at the time as a measure of a
18 restructured company. Isn't that true?

19 A We weren't referring to the text for that purpose. We
20 were referring to the text with respect to use of a
21 discounted cash flow analysis which the Eureka report failed
22 to use.

23 Q Now isn't a balance sheet by its nature really a snapshot
24 in time at the very time that the balance sheet is prepared?

25 A Yes.

1 Q So, at most, what a balance sheet shows, assuming that it
2 shows insolvency, is that the company is insolvent at that
3 very point in time, right?

4 A Yes.

5 Q And often balance sheets, when you look at them, are
6 really based upon dated information, that is accounting
7 information that has come in from a previous period, right?

8 A In some cases, yes.

9 Q Now a balance sheet doesn't show insolvency at the time
10 of reorganization, does it?

11 A At the time a reorganization plan is confirmed? I'm not
12 sure of the context of your question.

13 Q Well, let me ask a different question because this goes
14 right to it.

15 To determine whether equity will be in the money, we have
16 to look to the future, don't we?

17 A Not necessarily. I think we have to, for the purposes
18 today, make an assessment and considered judgment based on
19 the facts and circumstances available today.

20 Q Well, let me refer to your deposition, Page 168 starting
21 at Line 14:

22 "Question: Let me ask this question because you didn't
23 answer it. What does the financial condition of the company
24 today have to do with the financial condition of the company
25 will be when it emerges from bankruptcy without analyzing

1 whether or not old equity will be in the money?

2 "Answer: It's a data point in my view, a very
3 significant one. The current financial situation of the
4 company today, current projections of how the company is
5 likely to perform, the obligations it needs to settle to
6 emerge from Chapter 11, looking at all that data, my view is
7 that I don't believe equity will be in the money in this
8 case.

9 "Question: But in order to come to that assessment, you
10 have to look in the future as to when the company emerges
11 from bankruptcy, correct?"

12 And you answered, "Yes."

13 Do you recall that?

14 A I do.

15 Q Now, in particular, we have to look at a point in time
16 when Delphi emerges from bankruptcy to assess that. Isn't
17 that true?

18 A Yes.

19 Q Okay. And looking into the future involves making
20 predictions about how Delphi is going to be doing over the
21 next few months going forward. Isn't that correct?

22 A That's what traders in the public market do all the time.

23 Q Well, traders in the public market just yesterday are
24 paying twice as -- or today are paying twice as --

25 THE COURT: Oh, please, sir. Give me a break. What

1 were we talking about in there?

2 MR. ARAGON: I'm sorry, sir -- Your Honor.

3 THE COURT: I want the parties to come back in here.

4 (Recess taken at 4:19 p.m.)

5 (Proceedings resume at 4:21 p.m.)

6 (Witness resumes stand.)

7 THE COURT: Please be seated.

8 MR. ARAGON: Your Honor, I apologize to the Court
9 for any problem caused by that.

10 THE COURT: You may continue.

11 BY MR. ARAGON:

12 Q Mr. Resnick, now to make a reasonable prediction of how
13 Delphi will look as a company at the time it emerges from
14 bankruptcy, you'd have to estimate what the terms would be of
15 any negotiations between Delphi and its unions, right?

16 A That would be a factor, yes.

17 Q And you haven't done that as you sit here today, have
18 you?

19 A Those negotiations are ongoing so we have not.

20 Q And to make a reasonable prediction of how Delphi will
21 look at the time it emerges from bankruptcy, you would also
22 have to estimate what the terms would be of any negotiations
23 with General Motors, correct?

24 A Yes.

25 Q And you haven't done that prediction, have you?

1 A For the same reason. Those negotiations are ongoing.

2 Q And to make a reasonable prediction of how Delphi will
3 look at the time it emerges from bankruptcy, you further
4 would have to look at the structure of the reorganized
5 company to make a reasonable prediction, correct?

6 A What do you mean by "the structure?"

7 Q Well, I asked you a question, sir, in your deposition on
8 Page 172:

9 "Question: And for that path, along with all others, you
10 would need to look at the structure of the reorganized
11 company as well, right?"

12 And your answer was, "Yes."

13 You seemed to understand what I meant, then. The
14 restructured company when it emerges from bankruptcy.

15 A The structure, capital structure, operational structure,
16 certainly whatever changes would result from the
17 reorganization plan.

18 Q You have not done an analysis of the reorganized capital
19 structure of the company when it emerges from bankruptcy,
20 have you, sir?

21 A No, because we don't have a reorganization plan yet
22 around which to base a capital structure.

23 Q Okay. And to make a reasonable prediction as to how
24 Delphi will look at the time it emerges from bankruptcy, you
25 would also have to look at the automotive industry, not just

1 in the U.S. really, but other places in the world where
2 Delphi does its business, correct?

3 A Yes.

4 Q And you haven't done that yet, either?

5 A Not completely. We monitor that. We look at it
6 regularly as part of our work. But we haven't done the
7 assessment in the context of a reorganization plan yet.

8 Q Okay. To make a reasonable prediction of how Delphi will
9 look at the time it emerges from bankruptcy, you'd have to
10 estimate what Delphi's ultimate pension and OPEB liabilities
11 would be, correct?

12 A Yes.

13 Q Okay. When doing your balance sheet test, you're
14 assuming that Delphi is obligated to pay all pension
15 obligations. Isn't that correct?

16 A For that test, the amounts which are reflected on the
17 company's balance sheet, yes.

18 Q Okay. And you're assuming also when doing your balance
19 sheet analysis that Delphi will pay for all OPEB obligations,
20 correct?

21 A For which it is currently contractually liable, correct.

22 Q Right. However, it's true, is it not, that different
23 assumptions about pensions and OPEB liabilities could swing
24 Delphi's final situation when it emerges from bankruptcy
25 literally billions of dollars?

1 A Theoretically possible, yes.

2 Q Okay. So if you change those assumptions about the
3 future, about OPEB obligations, about pensions, about the
4 relationships with General Motors, about the situation of the
5 international automobile industry, if you look at all of
6 those, old equity might actually be in the money at the end
7 of the day, correct?

8 A Theoretically. And if you change a couple of players in
9 the Yankee's lineup they'll beat the Red Sox next year.

10 Q They might beat the Red Sox next year.

11 A They might.

12 Q And old equity might be in the money next year too,
13 correct?

14 A If you change all of those assumptions in a certain way,
15 theoretically possible.

16 Q Now all of those assumptions are changeable and will be
17 changeable going forward. Isn't that true?

18 A Not necessarily, no.

19 Q Now isn't it true your balance sheet test only looks at
20 whether or not the company is solvent or insolvent today?

21 A That test does, yes.

22 Q Okay. Now it's true we need to look at Delphi at the
23 time it emerges from bankruptcy because the company's
24 obligations may be restructured in such a way that equity is
25 in the money. Isn't that correct?

1 A Can you repeat that question, please?

2 Q Sure. We need to look at Delphi at the time it emerges
3 from bankruptcy because the company's obligations may be
4 restructured in such a way that equity is in the money,
5 right?

6 A It depends for what purpose. Not for the purpose, in my
7 view, for which we're here today for determining whether
8 there should be an equity committee and whether or not the
9 company is insolvent. I think there are legitimate ways to
10 analyze that question and make that determination today
11 without waiting until the end of the case.

12 Q Well, on Page 223 I asked the following questions and
13 received the following answers, starting on Line 8:

14 "Question: Isn't the test of whether or not equity is in
15 the money not on what the balance sheet is today, but what
16 the balance sheet is at the time that the company emerges
17 from bankruptcy?"

18 You said, "No."

19 Mr. Springer objected to form.

20 "Answer: At the time the company emerges from bankruptcy
21 its obligations are restructured.

22 "Question: And the obligations may be restructured in
23 such a way that equity is in the money?

24 "Answer: It may be restructured that all the value is
25 given to other creditors and equity is rendered worthless

1 which is generally the case in most bankruptcies in my
2 experience."

3 And then I -- and then I will ask you this:

4 In a Chapter 11 case you don't know for certain whether
5 or not equity will be in the money until the plan, the
6 reorganization plan, is confirmed, correct?

7 A You do not know with complete certainty until the end of
8 the case what the recovery would be for any stakeholder.

9 Q And it's true you have not been asked in formulating your
10 opinions and conclusions to determine whether or not equity
11 will be in the money as of the date of the reorganization,
12 right?

13 A Correct.

14 Q Because you think that's irrelevant?

15 A We have not been asked that question.

16 Q And you have not done an analysis as to whether Delphi
17 will be insolvent throughout its entire progress through this
18 Chapter 11 proceeding, have you?

19 A No, we have not.

20 Q Okay. Well, let's talk about stock trading. In Section
21 2 of your report, you opine, and I quote:

22 "The trading price of Delphi securities is the clearest
23 indication of the company's value."

24 That's your opinion, correct?

25 A For this particular purpose, yes.

1 Q It's the clearest indication to you of the company's
2 value?

3 A For the purposes of determining solvency today, yes.

4 Q Okay. And that's very important, what you just said.
5 It's only with respect to determining solvency today, right?

6 A It is an important factor, yes. Not for determining
7 reorganization value at the end of the case.

8 Q In fact, I asked you to identify any authority that
9 supports the use of this kind of methodology to determine
10 whether or not the equity of the company will be in the money
11 when it emerges from bankruptcy and you couldn't give me any
12 authority to that effect, correct?

13 A At that time I could not recall an academic authority. I
14 mentioned my experience as a banker in using market prices
15 for determining a company's solvency during the pendency of a
16 Chapter 11 case.

17 Q Now it's true, sir, is it not, to your own knowledge,
18 that there are cases, bankruptcy cases, where a company's
19 debt was trading for less than full value and ended up at the
20 end of the day receiving the full amount of the value of the
21 stock or the value of the debt securities that were being
22 traded when the company emerged from bankruptcy?

23 A Yes. There are some cases.

24 Q Now at the end of the day, market trading cannot tell the
25 full story, isn't it true, because until you confirm the

1 reorganization plan as with respect to the market trading,
2 you're not going to know for sure whether equity is in the
3 money, correct?

4 A The market will give you a good sense, in my view, of
5 what likely recoveries are. I think it's the best way to
6 ascertain the answer to that question.

7 As I said, until confirmation, no one knows what actual
8 recoveries the stakeholders will be.

9 Q Okay. Now if you were to try to do an evaluation right
10 now of Delphi and you wanted to do it on a reorganized basis,
11 you would need a definitive business plan. Isn't that true?

12 A Yes.

13 Q As you sit here today, sir, you're aware, are you not,
14 that Delphi does not have a definitive business plan?

15 A Because it has not addressed the key factors that would
16 be required to produce such a business plan, such as the
17 labor costs, the benefit obligations, its relationship with
18 General Motors which are --

19 Q The company has not come to a conclusion as to what
20 that's going to look like six months or a year or a year and
21 a half from now, correct?

22 A Has not addressed those issues at this time.

23 Q And you would also need, would you not, sir, a definitive
24 capital structure analysis to perform a full valuation of
25 Delphi on a reorganized basis?

1 A The cash flows from the business plan would allow us to
2 work with the company to develop a capital structure, and
3 that would be part of what we would use for our enterprise
4 valuation at that point in the case.

5 Q But as you sit here today, Mr. Resnick, you have not done
6 that analysis of a definitive capital structure, have you?

7 A No. I would not expect to at this point in the case. It
8 wouldn't make sense.

9 Q And the company hasn't finally resolved all of its labor
10 obligations, has it?

11 A No.

12 Q And the company doesn't have a resolution of all of the
13 various claims back and forth between it and General Motors.
14 Isn't that the case?

15 A That's correct, as well as other claims in the case.

16 Q Mr. Resnick, I'd like you to look, if you'd be so kind,
17 at Exhibit 46. That's the steady-state scenario.

18 A (Witness reviews exhibit.)

19 Q Do you recognize that document, sir?

20 A Yes.

21 Q What is that document?

22 A This is the company's steady-state scenario dated
23 December 7th, 2005.

24 Q All right. And what was the purpose of that steady-state
25 scenario, sir?

1 A The purpose of the steady-state scenario was for the
2 company to prepare for its board a set of projections of what
3 the business would look like for the next several years if
4 there were no changes to its business principally with
5 respect to the footprint of the business, that is the number
6 of businesses in which it operates, the labor cost structure
7 wages, the benefit obligations and also its relationship with
8 General Motors.

9 Q In effect, this assumes that the company will stay on the
10 same path that it was heading on before it entered into
11 bankruptcy, correct?

12 A Correct. And then in this presentation the company set
13 forth several I think the term was "overlays" of how it would
14 in the future begin to analyze the business as it addressed
15 each of the key issues critical to the company's
16 restructuring.

17 Q And senior management of the debtors presented this
18 steady-state scenario to the board, right?

19 A Correct.

20 Q And that was on December the 7th, 2005, right?

21 A Yes.

22 Q And you were present at that board meeting?

23 A I was.

24 Q And so this steady-state scenario is the company's best
25 estimate of what the company would look like, as I said, if

1 it just continued on this path that it was on before
2 bankruptcy?

3 A Yes.

4 Q And you didn't calculate the numbers in the steady-state
5 scenario. They were done by senior management of the
6 company, right?

7 A Correct. We were involved in terms of reviewing the
8 numbers and participating with the finance team as the
9 materials came together. But the numbers were prepared, I
10 think as Mr. Sheehan testified, bottoms-up from the operating
11 business units.

12 Q And you won't know whether or not the predictions and
13 estimates in this steady-state scenario are actually accurate
14 until, in fact, the events transpire during 2006 and 2007,
15 right?

16 A That's true with any set of projections.

17 Q Right. I mean, these are just projections. Isn't that
18 correct?

19 A That's exactly what they say they are.

20 Q Right. They assume no changes. These are projections,
21 right?

22 A Yes.

23 Q But the basis for the steady-state scenario is past
24 performance of the company and some estimates, right?

25 A The basis is past performance and the heads of the

1 operating businesses and then project it going forward, the
2 key elements. So it's not its past, but they looked at in
3 this industry a good deal of the business is already booked
4 because you have contracts that are negotiated several years
5 in advance for the new model, so they have a fairly good
6 sense of what products are produced, so they make
7 determinations on material costs and manufacturing around
8 them, so they develop their projections.

9 Q And that's based on past performance, the history of the
10 company vis-a-vis these various contracts and the things that
11 they sell and how much they sell over a period of time,
12 right?

13 A Not completely past. It's also their view of the future
14 because part of --

15 Q Right.

16 A In '06, '07, '08, '09, business unit heads are making
17 determinations of how much new business they will obtain --

18 Q I don't --

19 A And where the market will be, and what other -- what the
20 competitive situation is like, pricing, many factors.

21 Q Mr. Resnick, I don't quarrel with you that the steady-
22 state scenario is bottomed in part on predictions. But it's
23 also bottomed, as you just recognized, in part on what
24 actually has happened over the past few years with the
25 company, right?

1 A Yes.

2 Q Okay. Now as far as what has happened in the past, the
3 basis in part for the steady-state scenario, it's true, is it
4 not, that the steady-state scenario is based on information
5 that is, at best, current as of the date it was presented to
6 the board: December the 22nd -- or seventh, rather, 2005,
7 right?

8 A Yes.

9 Q Now just to make it clear, if the company were to
10 continue on with the steady-state scenario path, this would
11 be untenable. The company would basically go out of
12 business, wouldn't it?

13 A Yes.

14 Q And the debtors recognize that the business cannot
15 continue in the steady-state scenario because, among other
16 things, there would be downward -- they would need downward
17 adjustments of Delphi's labor costs, both OPEB and pension,
18 right?

19 A Among other factors.

20 Q Now you utilized the steady-state scenario when you
21 addressed the expert reports of Appaloosa's. Isn't that
22 correct?

23 A Yes, because they had referred to the steady state.

24 Q Uh-huh. I mean, this was the basis for your challenge to
25 some of their numbers, right?

1 A Well, my recollection is their report utilized the steady
2 state and made changes to it, so we compared their changes to
3 the steady-state projections.

4 Q Now you looked at steady-state projections, but they
5 looked at real numbers, for example, in GM's production for
6 the first couple of months of 2006, didn't they?

7 A Yeah.

8 Q Now you don't even know if the steady-state plan
9 correctly calculates the GM production in 2005, much less the
10 first two months in 2006. Isn't that right?

11 A In my deposition, I said I did not recall what GM
12 production was for 2005.

13 Q You don't even know if the steady-state plan correctly
14 calculates the decline in the production. That's what my
15 question was.

16 A I don't recall.

17 Q And you don't know if the steady-state plan correctly
18 calculates the volume change for General Motors North
19 America, correct?

20 A The steady-state plan has projections for GMNA volume
21 during the projection period.

22 Q And do you know if the steady-state plan correctly
23 calculates the projected volumes of sales for General Motors?

24 A Well, it's projections, so they rely on DRI, an outside,
25 independent firm, for their projections of General Motors

1 North America and volumes.

2 Q Now, sir, isn't it true that, while you rely on the
3 steady-state plan, wouldn't more current information on what
4 things look like since December 7th, 2005 affect your
5 assumptions going forward, as to whether or not the steady-
6 state plan actually is accurate?

7 A Current information is always going to be additive to
8 what had been done in the past. But when, in my experience,
9 you put a set of projections together, you use your best
10 judgment at the time for assessing the future, and companies
11 can't change their projections every moment.

12 Q But it's true, sir, is it not, that there are other
13 projections besides the steady-state plan with respect to the
14 restructuring transaction and what it might look like at
15 Delphi?

16 A I don't know if I'd used the word "projections." The
17 company has used the steady-state plan, as I think it
18 indicates in these materials, as a starting point for various
19 analyses, scenarios, and sensitivities it would look at as it
20 begins to assess its reorganization options.

21 Q Well, there are projections --

22 A I think they're set forth in --

23 Q I'm sorry, sir.

24 A -- in one of the pages here, Page 16, where we set forth
25 the basis of the steady-state plan, and then we set out what

1 the key, we call them "overlays" on Page 16 are, based on key
2 elements in the case: The footprint, the business of the
3 company, portfolio sale wind-down, any SG&A changes, the GM
4 issues in the case, the labor modifications, what would
5 happen to revenues, and that will lead ultimately to a plan
6 on which we will base an enterprise value.

7 Q Sir, it's true, is it not, that there are projections
8 besides the steady-state projections that exist at the
9 present time that the company is pursuing?

10 A The company has performed various, I would call them
11 "sensitivities" off the steady state for use in its
12 negotiations with the parties.

13 Q And these other projections had been discussed with
14 Delphi's board, correct?

15 A These sensitivities have been discussed with Delphi's
16 board.

17 Q And those projections, different from the steady-state
18 scenario projections, have not been shared with the movants
19 here, have they?

20 MR. BUTLER: Objection. Your Honor, we've been over
21 this ground with other witnesses. This is exactly what the
22 pretrial scheduling order, your chambers conference, and the
23 meet-and-confer conferences were about. This is outside the
24 scope of the summary proceeding.

25 MR. LAURIA: Your Honor, may I respond?

1 We had a meet-and-confer -- actually, before we had
2 the meet-and-confer, we agreed that we were going to get the
3 business plan that was submitted to the board on December
4 7th. When we reached that agreement with the debtor, we had
5 no idea, not an inkling, that there was a more recent plan
6 prepared that reflected the debtors' view on the changes that
7 were going to happen to its financial performance over time
8 as a consequence of its opinions regarding a labor
9 transition, which is fundamental to this reorganization.

10 And if we had known such a plan existed, we
11 certainly would have insisted on seeing it because it would
12 be a lot more helpful to us and the Court in assessing the
13 prospects of this company. And I just really think it's not
14 right for counsel to keep shoving in our mouth the fact that
15 we made an agreement when we didn't know this other plan
16 existed.

17 THE COURT: Were you on the call that we had, the
18 discovery conference call?

19 MR. LAURIA: Yes, I was, Your Honor.

20 THE COURT: Do you remember that call?

21 MR. LAURIA: I do. At that time, we did not know
22 this other plan existed. I'm sorry, Your Honor, but we
23 didn't know. And had we, I can assure you we would have
24 insisted on seeing it.

25 THE COURT: Didn't I say that you would not be able

1 to get other plans, that you could run your own sensitivity
2 analyses on the plan that they were going to rely on?

3 MR. LAURIA: Your Honor, we did not know that a
4 better plan --

5 THE COURT: Answer my question. Did I just waste an
6 hour and a half, after you people couldn't get your act
7 together to work out your own discovery schedule?

8 MR. LAURIA: Your Honor, if --

9 THE COURT: Did I waste an hour and a half a month
10 ago on this --

11 MR. LAURIA: Your Honor, if that's what you said, I
12 didn't --

13 THE COURT: -- and did you raise any of these issues
14 in the month and a half since then?

15 MR. LAURIA: Your Honor, if that's what you said, I
16 apologize because I didn't understand --

17 THE COURT: It is what I said, and you know it's
18 what I said.

19 MR. LAURIA: No, Your Honor, I'm sorry. I don't
20 recall it that way.

21 But I want to say that we only learned of this other
22 plan Friday, when Mr. Resnick was getting deposed. This past
23 Friday is the first we heard of the existence of this other
24 plan. And we are very troubled that we didn't know it even
25 existed because we would have argued about our entitlement to

1 see it at an earlier time, I assure you of that, Your Honor.

2 THE COURT: You did argue about the right to see any
3 projections --

4 MR. LAURIA: Your Honor --

5 THE COURT: -- that went off of this. Of course a
6 debtor is going to do sensitivity runs on its projections.

7 MR. LAURIA: Your Honor --

8 THE COURT: The debtor is not supposed to stay still
9 while one argues a motion for the formation of an equity
10 committee.

11 MR. LAURIA: Of course not, Your Honor. What we --

12 THE COURT: So why are you raising this point if you
13 know the law?

14 MR. LAURIA: What law am I supposed to know, Your
15 Honor? I'm sorry.

16 THE COURT: That a debtor is not supposed to stay
17 still while it waits for the movants for an equity committee
18 to conduct discovery and have a hearing. Of course the
19 debtor is going to run sensitivities on its projections.

20 MR. LAURIA: Well --

21 THE COURT: You can, too, and that was the authority
22 I gave you, and that's what your experts have done. They're
23 not relying upon the --

24 MR. LAURIA: What --

25 THE COURT: Let me finish. All right?

1 MR. LAURIA: I'm sorry.

2 THE COURT: Maybe if you let me finish, you'd listen
3 better, as you apparently did not listen at the hour-and-a-
4 half call that we had a month and a half ago.

5 They are not relying on those projections. As I
6 said a month and a half ago, that's their risk. Instead,
7 they're projecting the steady-state projections. And Mr.
8 Aragon has spent a lot of time; in fact, in my view, too
9 much, since he's gone over it three or four times, that those
10 were just that: they're steady-state projections. They don't
11 reflect changes that might happen in the future.

12 As a movant for an equity committee, that is to your
13 benefit, as I made it clear to you on that call. Do I have
14 to repeat why? No, because we said it then.

15 I also said, because of that, they don't have to
16 produce updates. You can do the sensitivities on that; they
17 can critique them, as long as they're not relying on the
18 updates, but instead upon simple logic and the knowledge of
19 their business, and that's what is happening.

20 And now we have wasted another half-hour. And
21 frankly, you have tried to turn this on its head. I don't
22 appreciate it. It's about the fourth time it's happened, in
23 a suggestion that the debtor is, quote, "withholding
24 documents," as it is clear, as I said yesterday, I am the one
25 withholding the documents. And I believe I did it correctly,

1 and I believe the parties have operated under that constraint
2 since then.

3 So I will not require the production of any further
4 sensitivity runs that the debtor is doing, and that's my
5 ruling.

6 MR. LAURIA: Your Honor, we're not asking for them
7 to be produced, and I --

8 THE COURT: No. You're just complaining about it
9 needlessly. Now please sit down, sir.

10 MR. LAURIA: Well, I apologize.

11 THE COURT: All right.

12 MR. ARAGON: Your Honor, upon that admonition, I'm
13 going to be very brief, I promise. I just have a few more
14 questions of Mr. Resnick.

15 BY MR. ARAGON:

16 Q Now even though Appaloosa's experts were working with, in
17 our view, limited information, still you didn't challenge,
18 did you, the key aspects of -- certain key aspects of the
19 report; such as, you didn't challenge the EBITDA multiplier
20 of the 5.2 to 5.9, did you?

21 A No, I did not.

22 Q And you didn't challenge the current run rate, either,
23 did you?

24 A No.

25 Q In fact, if you look at Page 57 of Delphi Corporation's

1 expert report, it's Exhibit 4 --

2 A I'm sorry. Which volume is that?

3 Q It's Exhibit 4, sir. It would be the first one in the
4 confidential.

5 A In the confidential?

6 Q Yes, sir.

7 A Exhibit 4 is the Eureka report?

8 Q Yes, sir. If you look at page --

9 A At which page?

10 q 57. This is entitled "Estimated Adjustment EBITDA Post-
11 Petition." The first period on that page is the month of
12 January of 2006. You don't challenge the adjusted EBITDA for
13 that period of \$18 million that was calculated by Eureka, do
14 you?

15 A No. For all the reasons we mentioned in our rebuttal, we
16 just thought the other comments we made were much more
17 relevant and didn't address this point.

18 Q And it's true, too, is it not, sir, that you did not
19 challenge the adjusted EBITDA for the period of October the
20 8th, 2005, the date of the petition, to the end of January
21 2006, which is \$59 million?

22 A Not specifically, no.

23 MR. ARAGON: I have no further questions, sir.

24 Thank you.

25 THE COURT: Okay.

1 MR. BUTLER: Your Honor, the debtors have no
2 redirect.

3 THE COURT: Okay. You can step down, Mr. Resnick.

4 THE WITNESS: Thank you, Your Honor.

5 (Witness excused.)

6 MR. BUTLER: Your Honor, may it please the Court,
7 and so the record is clear at this point, with the rulings on
8 the Daubert motions having been denied, I'd like to confirm
9 that all of the 244 exhibits -- actually 246, but all of the
10 exhibits have been admitted.

11 THE COURT: Okay.

12 MR. LAURIA: Yeah, confirmed, Your Honor.

13 THE COURT: Okay. They're all admitted as per the
14 numbers in the binders.

15 MR. BUTLER: Your Honor, that would conclude the
16 debtors' rebuttal case. We'd like to get some guidance from
17 the Court on how you'd like to entertain, if you want to
18 entertain closing arguments, if the Court is so inclined.
19 Seeing as there are a total I think of four objectors, as
20 well as the movant, perhaps some guidelines from the Court on
21 time limits or however you might want to consider it.

22 THE COURT: Well, again, the parties have provided a
23 pretty thorough briefing on this, including in respect of the
24 movant's papers, a lengthy response; not only to the briefs,
25 but also commenting on the discovery at that point. So what

1 I'm looking for is really fairly concise closing argument,
2 focusing in on the trial evidence.

3 And my thought is that we'll start at 5 on that, and
4 I would say a half-hour for Appaloosa, and roughly a half-
5 hour for the objectors. I know there are a couple who have
6 been sitting through the trial and have been dying to say
7 their piece and haven't gotten to open their mouths, so it
8 might be a little longer for you all, just to hear their
9 perspective, but I don't expect the other objectors to repeat
10 what the debtors are going to say, so ...

11 MR. BUTLER: We'll coordinate during the recess,
12 Your Honor.

13 THE COURT: If they have a -- you know, if they have
14 an extra point that hasn't been made or that's specific to
15 their constituency, then that's worth making. So I assume
16 we'll go until about six, 6:15.

17 MR. BUTLER: Thank you, Your Honor.

18 THE COURT: Okay. So I'll be back in five minutes.

19 (Recess taken at 4:52 p.m.)

20 (Proceedings resume at 5:04 p.m.)

21 THE COURT: Please be seated.

22 Okay. Mr. Lauria?

23 **CLOSING ARGUMENT FOR APPALOOSA MANAGEMENT, LP**

24 MR. LAURIA: Thank you, Your Honor.

25 The debtors' Chief Restructuring Officer Mr. Sheehan

1 said two things on the record yesterday that I think are
2 critical to the determination the Court is being asked to
3 make:

4 Number one, looking at the balance sheet, after
5 acknowledging that the liability numbers had been adjusted,
6 on inquiry from the Court, Mr. Sheehan testified that the
7 assets had not been and that, in quotes, "the assets were not
8 worth less than book."

9 The second thing he said was that the debtors had
10 looked at alternative labor deal scenarios that reflect
11 annual savings that are the same and, in some cases, greater
12 than those put forth by our experts. But Mr. Sheehan still
13 couldn't or wouldn't concede that there might be value for
14 equity.

15 Now, as to the first statement, that the assets are
16 not worth less than book. If we're trying to get a sense of
17 economic reality and management believes that the assets are
18 not worth less than book -- by that I mean that they're worth
19 more than book -- why wouldn't they show that to the board on
20 December 7th and to the Court now? It feels a little like
21 we're being gamed. It feels a little like it is the debtors
22 against the shareholders. It doesn't feel like shareholder
23 interests are being protected adequately. It doesn't feel
24 like they're being represented at all. It feels like the
25 opposite.

1 As to the second statement by Mr. Sheehan, that the
2 company had developed scenarios showing savings that are
3 comparable to or greater than those prepared by our experts,
4 but still, no acknowledgement of value for equity, I think
5 that statement really speaks for itself. You get the sense
6 that no matter how much savings Delphi could experience from
7 the labor transition, that Mr. Sheehan still wouldn't
8 acknowledge that there's value for equity. Is this really to
9 be the sole fiduciary representative for the 300,000
10 shareholders in this case?

11 The company's approaches to determining whether or
12 not equity is hopelessly out of the money we believe are
13 fatally flawed and skewed to the detriment of old equity.
14 Both the balance-sheet approach and the market-value-of-the-
15 debt approach fail to answer the bell because they do not
16 capture the forward-looking nature of the inquiry. The test
17 is widely recognized as being an appearance of being
18 hopelessly insolvent. We don't dispute that. I want to be
19 clear on that point, Your Honor.

20 The debtors understand that test, best evidenced by
21 their letter to the United States Trustee not to appoint a
22 committee, which specifically states the standard and that
23 they've concluded it has not been met. But everyone,
24 including Mr. Resnick today in his testimony, knows that a
25 balance sheet has no forward-looking component to it. It is

1 as of a point in time that, by definition, has to have
2 already occurred, unless it's a projected balance sheet, and
3 that clearly has not been presented.

4 Anecdotally, Your Honor, in twenty years of
5 practicing in this area, I have never been able to observe a
6 correlation between a debtor's balance sheet at the time it
7 files its Chapter 11 case and ultimate recoveries under a
8 Chapter 11 plan.

9 THE COURT: It usually shows greater value for
10 assets, though, doesn't it, than what actually transpires?

11 MR. LAURIA: That's true, Your Honor.

12 THE COURT: Notwithstanding Mr. Sheehan's statement,
13 which I understand why you went first with that one.

14 MR. LAURIA: That's certainly true, Your Honor.

15 THE COURT: Okay.

16 MR. LAURIA: Everyone, including those who believe
17 that the market and securities of a distressed company is
18 efficient -- and there are those who disagree, including both
19 scholars and courts -- also know that a transaction in an
20 efficient market is evidence of price at the time of the
21 transaction and not at any other time. Mr. Resnick admitted
22 this today in his testimony. Were it otherwise, Your Honor,
23 the pricing graph of Mr. Butler would have a straight line on
24 it, rather than one that shows changes over time as new
25 information gets into the market.

1 Moreover, as with balance sheet tests, I have never
2 seen a correlation between the trading price in a debtor's
3 securities at the beginning of a case and ultimate recoveries
4 under a plan at the end.

5 For that matter, the same is also true of research
6 reports, and we've all looked at lots of them over the years.
7 Generally, they get it wrong.

8 There's another aspect of the trading price of the
9 company's debt, though, that I think is relevant for the
10 Court to consider, and that is the fact that a distressed
11 investor who is today buying the company's debt at sixty
12 cents is looking for a return. In fact, hedge funds are
13 looking for twenty to twenty-five percent returns. And if
14 you assume a two-year time line for this Chapter 11 case, in
15 fact, an investor who buys debt today at sixty cents is
16 looking for a par-plus recovery to get that annualized
17 return.

18 As to the balance sheet, as I previously mentioned,
19 Mr. Sheehan has admitted that liabilities have been worked
20 on, but the assets have not, and there is an upside in the
21 assets. In fact, it's noteworthy that the pension and OPEB
22 liabilities of the debtors are apparently quite volatile at
23 this point, even in the debtors' view.

24 At the recent Creditors' 341 Meeting, which was held
25 on February 3rd this year, the debtors presented information

1 to the creditors indicating that the aggregate pension and
2 OPEB liabilities were \$13.95 billion; yet, in Mr. Butler's
3 pie chart, the number is presented as being \$10.729 billion.
4 That's a swing of over \$3 billion in a month. How much more?
5 In fact, with that kind of volatility and knowing that
6 there's upside in the assets, it's not even a stretch to get
7 to solvency in the debtors' way of looking at things.

8 It's even easier, Your Honor, if the company would
9 properly reflect its liabilities. By definition, a liability
10 is an enforceable obligation to pay; and, yet, despite
11 recognizing that OPEB is not vested and that there is no
12 obligation beyond October 2007, the debtors reflect on their
13 balance sheet a number that expresses the present value of
14 the current benefit level into infinity. Mr. Butler's
15 insinuation that the plans continue to exist after the expiry
16 of the CBAs and is somehow enforceable is just plain wrong.
17 The plans expressly reserve the company's right to amend,
18 modify, or terminate them.

19 Under existing precedent in the Second Circuit, I
20 would cite the Court to American Federation of Grain Millers
21 v. International Multifoods, 116 F.3d 976 (2d Cir. 1977),
22 specifically held that:

23 "When the right to amend, modify, or terminate is
24 retained in the plan, upon termination of the CBA,
25 the obligation under the plan also goes away unless

1 the obligation is vested."

2 We don't have that here.

3 Now we're not suggesting that the number should be
4 taken to zero. That's impractical. What we are suggesting,
5 though, is that the number should be reduced to reflect what
6 everyone knows is going to happen. The obligation is going
7 to be materially reduced. I probably don't need to remind
8 the Court, but I will, that the company is currently paying
9 over \$64 an hour for its laborers. Market is half that or
10 less. It's got to come down.

11 It's a simple point, Your Honor. The debtors'
12 analyses are not predictors and don't pretend to be
13 predictors of reorganized value in the future. To that
14 extent, if the Court agrees that the term "hopeless" means
15 not only not now, but it means not ever, then those analyses
16 don't answer the question.

17 Now our position on that is not novel. The fact
18 that the debtors would try to use them to declare equity out
19 of the money now and forever is extraordinarily problematic
20 for the company's shareholders.

21 THE COURT: Well, they're not saying you're out of
22 the money forever.

23 MR. LAURIA: Well, Your Honor --

24 THE COURT: They're not looking -- this is not -- my
25 ruling today, however I rule, is not *res judicata* or

1 collateral estoppel on valuation.

2 MR. LAURIA: I understand that, Your Honor. But the
3 debtors' position as to why there should not be an equity
4 committee is that the company is hopelessly insolvent and
5 hopeless -- if they mean what they say, "hopelessly
6 insolvent" means no chance. That's the debtors' position.

7 I'm not suggesting that your ruling, either way, is
8 binding on us, the debtors, or anybody else. I'm just saying
9 that the debtors' position in its papers is that we're
10 hopelessly insolvent --

11 THE COURT: Okay.

12 MR. LAURIA: -- and that's got to mean not now, not
13 ever, or the word "hopelessly" has been redefined in the
14 English language.

15 THE COURT: Okay.

16 MR. LAURIA: Now, knowing the sophistication of
17 management and the professionals who are advising them, this
18 strategy is not one taken out of ignorance. So it raises
19 concerns regarding the motives of the people whose motive is
20 at issue here; and, to that extent, I do want to try to
21 respond to the Court's concern.

22 This is not about Mr. Tepper or Appaloosa or White &
23 Case. The fact that the debtors believe that Mr. Tepper or
24 Appaloosa or White & Case are good people or bad people
25 should not color the Court's ruling here. The issue is:

1 Under the facts and circumstances, are the shareholders of
2 this company entitled to representation by a formal
3 committee? And I just hope that the Court will not hold any
4 perceived misconduct on the part of my firm or Mr. Tepper
5 against the shareholders on that issue.

6 Now the company's pension and OPEB liability, like
7 all other obligations of the company, should not be double-
8 counted in valuing the company. And I want to just use two
9 quick examples.

10 Let's consider how a true lease is dealt with in
11 valuing a company. The current year's rent is included in
12 the costs that are subtracted from revenues to get to EBITDA.
13 The EBITDA is then multiplied by whatever multiplier the
14 professional determines is appropriate and then, in going
15 from enterprise value to equity value, you don't turn around
16 and subtract the present value of the remaining lease
17 obligation. That would be a double-count of the lease.

18 Now let's talk about how you deal with debt for a
19 minute. Debt you treat the other way. In calculating
20 EBITDA, the current year's interest and amortization
21 obligations are not subtracted from revenues. They're added
22 back. Then, after enterprise value is calculated, the
23 present value of the debt obligation is subtracted to get
24 from enterprise value to equity value. In both cases, the
25 obligation only gets counted once.

1 Now I'd like to go back to Mr. Springer's
2 questioning of Mr. Greene yesterday. He asked a series of
3 questions about why the costs of a labor transition had not
4 been subtracted from Delphi's EBITDA, implying that Eureka
5 had overstated the EBITDA in its valuation. The fact is that
6 the total cost, over \$2.6 billion in Eureka's estimate, had
7 already been subtracted in going from enterprise value to
8 equity. If it were also subtracted from EBITDA, you would
9 have a double-count.

10 It would be inappropriate, moreover, to subtract the
11 buy-out from revenues in calculating EBITDA because this is
12 not a recurring expense. Application of a multiple would
13 have the effect of treating that as a recurring expense and
14 it's a one-time item.

15 Now the flip side of this is that if the annual
16 costs of the pension plan and OPEB are subtracted from
17 revenues to get to EBITDA, and they have been, then it would
18 be inappropriate to turn around and subtract the present
19 value of these obligations from enterprise value to derive
20 equity value. That would be a double-count.

21 This is all said to demonstrate the fact that Mr.
22 Butler's pie chart is not just a sloppy surrogate for a
23 proper, forward-looking valuation; it gives the wrong answer.
24 It suggests that you just subtract the pension and OPEB
25 liability from the value of the assets to determine if

1 there's a deficit. Your Honor, it's not that simple.

2 I'd like to walk through the sequence of events
3 going from Eureka's March 6 report to its March 10 report,
4 and finally to its March 17 report, to demonstrate the
5 propriety of what was done and that, contrary to Mr. Butler's
6 argument, our valuation has not been refuted.

7 As clearly testified to by Mr. Hyman yesterday,
8 their driving principle in developing a base case on which to
9 add adjustments from a labor transition was from the
10 beginning, in the middle, at the end, and yesterday, when he
11 was on the stand, to make sure that the base case reflects
12 the most recent full-year results and the current-year run
13 rates of the company, absent some explanation of why the
14 numbers should be different. Applying this principle, Mr.
15 Hyman believed that the base case EBITDA assumption should
16 produce a number somewhere between negative 154 million and
17 positive 200 million.

18 By the way, Your Honor, the top-end number is
19 actually \$185.3 million. That's \$59 million which is the
20 EBITDA from the first four months. It's not actually four
21 months. It's actually from October 9th to January 31st, so
22 it's 115 days. So the multiplier on that fifty-nine is 3.14
23 instead of three; 3.14 being the fraction you get when you
24 divide 115 into 365. So the top of that number is 185.3, not
25 200. I wanted to make sure we were clear on that.

1 In preparing the March 6 report, Eureka used the
2 company's 2005 EBITDA as its starting point. That was the
3 negative one-hundred-and-fifty-four-million-dollar number.
4 And the reason for that was that they got the steady-state
5 projections the Sunday before they were preparing -- the
6 report had to be filed, which was on Monday. They didn't
7 have time to digest it, to understand it, and to analyze it,
8 to work with it, and they weren't comfortable including it in
9 the report, so they just took 2005.

10 Now, in moving to the March 10 report, which they
11 had to file four days later, they tried to work with the
12 company's steady-state numbers in order to avoid controversy.
13 The closer their case was to what the debtor put on the
14 table, the less there would be to argue about, presumably.
15 They made comparatively minor changes. Not realizing that
16 the depreciation and amortization had already been accounted
17 for, they added it back to get an EBITDA number that happened
18 to be \$180 million.

19 Mr. Hyman testified that, because that number was in
20 his acceptable range, negative one fifty-four to positive two
21 hundred; one eighty, he thought that was an acceptable number
22 to work from, so he did it. He thought that it would less
23 controversial, easier to digest, easier to contend with in a
24 dispute.

25 When the debtors pointed out the error, however,

1 that the D&A had already been backed out, then he had to
2 revise his numbers based on that and taking the \$1.2 billion
3 out, moved the number out of a range that he thought was
4 appropriate to use for a starting point. He was now at a
5 negative-over-a-billion-dollar number and his bracket was
6 negative one fifty-four to positive one-eighty. He didn't
7 have an explanation for the negative number, so he thought
8 the best thing to do was to dig into the steady-state numbers
9 and adjust them to reflect the 2005 results and the four
10 months we had while in Chapter 11. The adjustments he
11 applied brought him to a positive one-hundred-million-dollar
12 EBITDA number for his base case; that is, before addressing
13 the savings of the labor transition.

14 The point is that Eureka's approach was the same
15 throughout the process. This was no back-looking adjustment.
16 They were looking to conform the base case to recent results,
17 absent explanation, and trying to avoid controversy.

18 I think it's important to mention, by the way, Your
19 Honor, that wherever you fall in that range, between the
20 negative one fifty-four and the positive one eighty, the
21 impact on valuation is slight. Ultimately, the valuation
22 range stays pretty much the same.

23 Now the debtors have not challenged the two-and-a-
24 half-to-three-billion-dollar savings from the labor
25 transition. Indeed, the debtors' own materials that were

1 discussed on the record yesterday reflect numbers that are
2 substantially higher than that. Nor has there been any
3 challenge to the 5.1 to 5.9 "X range" of multiples.

4 So if you accept something close to the Eureka base
5 case, you have a value range of approximately \$12.7 billion
6 to just over \$16 billion. Then, if you take out the
7 deductions as set forth in Page 41 of the March 10 report,
8 which had a range of nine to \$9.8 billion. After paying down
9 those deductions with the company's cash, you have a
10 valuation range for equity of 3 billion to approximately \$6
11 billion.

12 Now, in those deductions, most of them are hard to
13 quarrel with. The only one that the debtors have gone on
14 record fighting about is the 2.6-billion-dollar buy-out on
15 the labor. However, the debtors have not offered a better
16 number. So, we're left with a 2.6-billion-dollar subtraction
17 getting us to \$3 billion of equity at the bottom end. That
18 number would have to be more than double just to get the
19 bottom-end number of Eureka's range to zero, and it would
20 have to be double, going to triple, to get to a point where
21 most of the range doesn't have equity getting a recovery.

22 But the bottom line -- there are really two issues
23 here:

24 Is there a bona fide interest to be protected and is
25 that interest being protected? We believe the answers *in*

1 *seriatim* are yes and no.

2 As to the bona fides of old equities' interest, we
3 presented a reasonable, not a pie-in-the-sky case, showing
4 that there can be value for old equity. Far from an
5 appearance of a hopeless insolvency case, there is a real
6 opportunity to preserve value for Delphi's 300,000
7 shareholders.

8 Notably, our analysis was prepared under
9 extraordinarily difficult circumstances. Not only was the
10 information consistently late in coming from the debtors, but
11 oftentimes it was jumbled and confused and took time just to
12 sort out, so that it could be digested. Against our
13 analysis, the debtors have failed to come forward with
14 anything that addresses the forward-looking issue of
15 hopelessness. They've chosen to proceed on the basis of now
16 or the recent past they have to live with.

17 As to whether or not the interests of the
18 shareholders are being protected, the case couldn't be
19 clearer. Every variable that the company controls they have
20 adjusted in a way that is unfavorable to old equity.

21 As to the valuation of OPEB, various adjustments
22 have been made that we believe show that the OPEB is clearly
23 overstated by \$2.6 billion.

24 As to the timing of the pension payment in 2007, the
25 steady state assumes that the payment is going to be made on

1 June 30th, but if it were made two weeks earlier, on or
2 before June 15th, you could save another \$350 million.

3 THE COURT: On a snapshot basis?

4 MR. LAURIA: On a snapshot basis, Your Honor.

5 Rather than adjusting projections to reflect the
6 most recent results in the run rate, they've left that to us
7 to try to figure out. Playing with the balance sheet,
8 they're reflected liabilities that are not legally
9 enforceable and on the asset side, they've admitted that
10 there's upside, but they don't reflect it.

11 Taking the public position of hopeless insolvency,
12 given the absence of an appropriate evaluation of the
13 prospects for value in the future was irresponsible at best.
14 The problem of the company's track record is militated by the
15 positional conflicts that now exist between management and
16 old equity.

17 As we talked about in the opening, the proposed KERP
18 puts management in competition with old equity for a share of
19 the value of the reorganized company. The competition, I
20 might add, it is most easily won if equity doesn't have a
21 seat in the room.

22 To the extent that appearance is important -- and I
23 think it is, Your Honor, under these circumstances -- what
24 are the moms and pops out there who own stock in this company
25 likely to think if this process results in them getting wiped

1 out without an equity committee and management taking home
2 ten percent?

3 THE COURT: Is there any motion actually scheduled
4 on that original KECP?

5 MR. LAURIA: I think debtors' counsel is better --

6 MR. BUTLER: Your Honor, that motion is currently
7 carried to the July omnibus hearing. There are negotiations
8 between the Creditors' Committee and the company on that,
9 which will be dealt with this summer.

10 THE COURT: Okay.

11 MR. BUTLER: That's the current status.

12 THE COURT: Okay.

13 MR. LAURIA: There's a second positional conflict
14 that may even be more important, however. The debtor is
15 currently engaged in what are no doubt difficult negotiations
16 regarding the transition of its labor costs. These
17 negotiations involve the UAW and GM, two pretty big guys, who
18 we understand from the debtors know how to negotiate tough.
19 Management's job in those negotiations is clearly made easier
20 if they don't have to worry about old equity and structuring
21 the deal. In that regard we have to ask, is there anything
22 in this record that should make shareholders comfortable,
23 that if it comes down to structuring the deal, so as, for
24 example, not triggering GM's indemnity or fighting GM's
25 indemnity claim, that management will hold the deal up to

1 preserve value for equity. For a management that doesn't
2 even want to engage on the topic of what reorganization value
3 is going to be, but will nevertheless swear that the company
4 is hopelessly insolvent, we think the answer can't be
5 anything but no.

6 A final point I'd like to make Your Honor, I think
7 as we all learned a little while ago, there apparently is a
8 partial labor deal in place. We don't know what the terms
9 are. We don't know what the implications are. We don't know
10 what commitments have been made and what rights are proposed
11 to be surrendered. That motion is going to be filed today,
12 and it's going to be heard on April 7. If a committee, not
13 just Appaloosa, is going to respond on behalf of
14 shareholders, we need that committee appointment right away.

15 Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. LAURIA: Oh, Your Honor, I apologize. I believe
18 there's counsel for another substantial shareholder of the
19 company who is in the court, who just wanted to announce
20 their joinder in our --

21 THE COURT: Were these the folks that filed the
22 pleading the other day?

23 MR. LOWENTHAL: A brief, Your Honor.

24 THE COURT: I forget the name of your client. Or
25 did you file a pleading the other day?

1 MR. LOWENTHAL: Pardon me?

2 THE COURT: Did your client file the pleading in
3 support the other day?

4 MR. LOWENTHAL: Yes, Your Honor, we did. Several
5 days ago.

6 THE COURT: I have that.

7 MR. LOWENTHAL: Okay. Can I address the Court for
8 just a moment?

9 THE COURT: I don't want you to repeat anything.

10 MR. LOWENTHAL: Fine. Thank you.

11 THE COURT: So why don't you do that?

12 **CLOSING ARGUMENT FOR BRANDES INVESTMENT PARTNERS, LP**

13 MR. LOWENTHAL: Your Honor, the only thing that is
14 important is that this shareholder was a holder of over five
15 percent of the company's stock from before the bankruptcy was
16 filed. I think it's important --

17 THE COURT: Well, no. I'm saying why don't you go
18 ahead?

19 MR. LOWENTHAL: Thank you, Your Honor. Good
20 afternoon. Daniel Lowenthal of Thelen, Reid & Priest. We
21 represent Brandes Investment Partners, and we did file a
22 pleading several days ago. I just wanted to expand on one or
23 two points.

24 Brandes, just so Your Honor understands, is an
25 investment advisory firm; and it has, pursuant to its

1 clients' authority, the right to vote shares, as well as to
2 buy and to sell them. It has over a \$100 billion under
3 management right now, and it was just remarked, prior to the
4 petition date here, Brandes had a --

5 THE COURT: I'm sorry. Did you say a hundred
6 billion or million?

7 MR. LOWENTHAL: A hundred billion, Your Honor.

8 THE COURT: Okay.

9 Mr. LOWENTHAL: 6.7 percent of Delphi's equity. It
10 currently has about 5.3 percent.

11 Brandes has been monitoring the motion and we've
12 been in contact with counsel for Appaloosa. We support the
13 relief here, Your Honor, and if Your Honor grants the motion
14 and a committee is appointed, Brandes, as mentioned in our
15 pleading, would certainly be willing to serve on the
16 committee and they've served on other equity committees in
17 the past and present, including Interstate Bakeries and Winn-
18 Dixie. That's essentially it.

19 The key point being, from their perspective, Your
20 Honor, is that from the outset, prior to the petition date,
21 we're a serious equity-holder and continue to monitor and be
22 involved and support the relief being sought here.

23 THE COURT: Okay.

24 MR. LOWENTHAL: I don't want to take up any more of
25 the Court's time. Thank you.

1 THE COURT: Thank you.

2 **CLOSING ARGUMENT FOR THE DEBTORS**

3 MR. BUTLER: Your Honor asked us in these closing
4 arguments to address how the evidence applies to Appaloosa's
5 burden of proof to establish that there is a substantial
6 likelihood that they will receive a meaningful distribution
7 in the case under a strict application of the absolute
8 priority rule, and that they will be unable to represent
9 their interest in the bankruptcy case without an official
10 committee. Those are, after all, the standards in Williams
11 Communications, similar standards addressed in Your Honor's
12 priority rulings in Loral.

13 And, as the Court knows, the burden is theirs and
14 not ours. And when the Court evaluates the evidence, I think
15 there are three or four pieces of key evidence here.

16 The first, going back to the matters we talked about
17 in the opening, I'm just referring to the exhibits that are
18 now in evidence, on a balance-sheet test, Exhibit 204, makes
19 it clear that as of January 31st, 2006, that the debtors were
20 insolvent on the balance-sheet test to the tune of almost or
21 in excess of \$6.3 billion. Mr. Greene testified that he did
22 not quibble in any respect with the financial statements or
23 the fact that they are in a GAAP balance.

24 (Counsel confer.)

25 MR. BUTLER: And similarly, as we walk through

1 there, the next --

2 (Counsel confer.)

3 MR. BUTLER: The next exhibit, Your Honor, I want to
4 hold it up, is Exhibit 205 now in evidence. It makes clear
5 that of the 20 billion or so, seventeen and a half billion
6 dollars are a liability, subject to compromise and when you
7 drill down into the seventeen and a half billion, Your Honor,
8 you find that there's about \$7.4 billion worth of OPEB on the
9 balance sheet. Again, Mr. Greene, in his testimony, did not
10 quibble with that at all and, Your Honor, I point out that
11 when Mr. Lauria, in his close, criticized me for my other
12 chart that simply said, gee, where did the \$7 billion go,
13 because that's what they basically said is the math, that I
14 was doing something wrong in this analysis. I point Your
15 Honor to Page 8 and Page 48 of their reply, when they -- this
16 is their analysis, they say and Mr. Aragon, you may recall,
17 in cross-examination did this same math with Mr. Sheehan and
18 said, well, don't you -- you just simply take this away,
19 don't you, in trying to put it down. And, in fact, that's
20 not what the balance-sheet test or the insolvency test states
21 and Mr. Resnick's expert report, their expert report of
22 Rothschild Exhibit 14 summarizes that first factor and we
23 acknowledge it's a factor.

24 THE COURT: Well, I think -- although I think he was
25 shifting gears, but I guess the possible implication of what

1 Mr. Lauria was saying is that the debtors were double
2 counting the OPEB, since they had it in somewhere else. Do
3 you agree that the OPEB is reflected somewhere else in the
4 balance sheet?

5 MR. BUTLER: I don't agree that there's any double
6 counting on the balance sheet. There's no. I mean, I think
7 what Mr. Lauria was trying to do was combine their financial
8 valuation analysis with the balance sheet. Obviously, when
9 you look at a balance sheet, you look at liabilities in one
10 respect. If you're looking at a income statement, you look
11 at expense items, income and expense items and they're in
12 another area.

13 THE COURT: Okay.

14 MR. BUTLER: But on the -- what I found remarkable
15 in their papers and in their argument is that you simply
16 ignore a third -- almost a third -- more than third of the
17 pie and then we have, in their words, in their reply brief,
18 that's the math you do to get positive EBITDA and that -- or
19 rather not positive EBITDA, rather -- excuse me. Strike
20 that. Positive value because then the assets exceed the
21 liabilities.

22 Second data point, Your Honor, also recognized in
23 this district, recent trading prices of securities, captured
24 on Exhibit 208, Trial Exhibit 208, also discussed in the
25 Rothschild report in Exhibit 13 and 14. And again, Your

1 Honor, the big -- the bright orange line is the sixty percent
2 ceiling and at least prior to the trading over the last
3 twenty-four hours, at no time from during the last 120 days
4 or so has there been any trading above sixty cents
5 appreciably here. There may be something right around the
6 orange line of any -- of the securities of this debtor during
7 that period of time and no -- and no, in the evidence, this
8 is uncontroverted. No argument that these numbers are wrong,
9 that this is not, in fact, the evidence.

10 While we're on this, because it has a time line
11 here, Your Honor, and you can follow the trading prices on
12 this, obviously, we go all the way back. At least initially,
13 Appaloosa made a big deal about dividends. Again, I would
14 ask Your Honor to evaluate the evidence because this is what
15 -- the evidence it's in. Mr. Sheehan, in his redirect
16 examination, took Your Honor through each of the events, some
17 of the major events reported publicly, that occurred from and
18 after the date of August 2nd, when the second-quarter
19 dividend was paid, through the time the third-quarter
20 dividend was canceled or no -- the decision was made not to
21 pay a third-quarter dividend through the debtors' Chapter 11
22 case and Exhibits 18 through 22 highlight each of those major
23 events that occurred. None of them, in Appaloosa's papers,
24 they talk about date line this and date line that. They
25 happened to skip, conveniently, five or six date lines that

1 were in the SEC record that were material and if Your Honor
2 actually overlaid them on this trading history, the market
3 thought it was material long before the Chapter 11 case
4 because you can see, if you actually track the announcements,
5 starting with the 10-Q, Exhibit No. 18, you can see the drop
6 in market price starting right there and you can track in the
7 announcements, as each of these events occur and they were
8 rolled out in the periods -- in the post-petition or rather
9 the pre-petition period, what occurred. So second data
10 point.

11 All right. Third data point, Your Honor. And we
12 are very mindful of Your Honor's discovery rulings and what
13 you conceded and what we needed to be able to prove and rebut
14 and how we should approach it. And, Your Honor, also it's
15 important to recall Your Honor's pretrial order and discovery
16 order and the declarations signed and I hope Your Honor will
17 examine the declarations that were signed by Mr. Greene at
18 Trial Exhibit 3 and Mr. Hyman at Trial Exhibit 5, as well as
19 the expert report at Trial Exhibit 4, that were all dated
20 March 10th, 2006. They have an obligation under Your Honor's
21 scheduling order, under the pretrial order, to submit their
22 evidence on March 10th. That was the time and that was the
23 last time, under the terms of the scheduling order that they
24 were supposed to put forward their report and it was that
25 report that was subject to discovery, deposition, cross-

1 examination and preparation for this hearing.

2 And what happened, Your Honor? Mr. Resnick and his
3 colleagues at Rothschild analyzed that report that was
4 received on the 10th, which I think was a Friday. Over the
5 course of the weekend they analyzed that report and prepared
6 their expert report and guess what? If you look at Exhibit
7 14, the Rothschild report, they found a fundamental and fatal
8 error with respect to that report and that was a 1.2-billion-
9 dollar error, which Mr. Hyman conceded on the record, in the
10 examination, was a mistake. And that number caused their
11 valuation to be negative. Mr. Lauria acknowledged that and
12 said, well, gee, if it was negative, that was outside of Mr.
13 Hyman's bracketed, acceptable results. It's not clear to me
14 how Mr. Hyman gets this sort of bracket order, acceptable and
15 unacceptable, but on or inside of his bracket, acceptable
16 results.

17 And so, they scurried around and seven days later,
18 long after they were entitled to do under the pretrial order,
19 they submit supplemental declarations, not subject to cross -
20 - to discovery because depositions had already been taken in
21 which they said, well, never mind, we'll adjust five other
22 items.

23 And you heard, and I thought it was interesting, Mr.
24 Hyman conceded a second mistake on the record. He said in
25 his testimony, it was a mistake for me to have material costs

1 at fourteen -- I always get the math wrong here, \$14 billion,
2 14.3. It really should have been 13.9. He said, I picked
3 the midpoint of a range between the debtors and where we were
4 and I shouldn't have. It was a mistake. All right. Well,
5 how many mistakes do experts get to make in the only expert
6 report they're supposed to present in a proceeding and, you
7 know, without going to the direct credibility of their
8 reports?

9 And so what happened is, when he wasn't happy with
10 the 1.2 billion, he said, you know what, I made a mistake.
11 His testimony. A mistake on these others, so I'll change
12 these. The net result is no surprise. After he changes the
13 numbers, five of them, he gets back into his bracketed
14 acceptable range and that becomes the revised report.

15 Your Honor, our view is that the -- Your Honor
16 obviously is the trier of fact and determines the credibility
17 of the evidence, but as we said in our opening, we believe
18 the evidence, as it relates to anything after the March 10th
19 reports, are incredible and should not be considered by the
20 Court.

21 I talked a bit about the market evidence, Your
22 Honor. The market evidence wasn't just what was in Exhibit
23 208. The market evidence is also reflected in a host -- a
24 host of analyst reports, designated by Appaloosa, not
25 designated by the debtors, but they came in under the joint

1 exhibit and there are a huge number of them in the evidence
2 now that have been admitted and what those reports -- and it
3 was conceded by Mr. Greene in his testimony, I believe, it
4 was either Mr. Greene or Mr. Hyman, it certainly went by
5 Eureka, that when you went through all of the reports they
6 designated, equity was zero.

7 That was -- the analysts determined equity was not
8 going to have a recovery, but you heard Mr. Greene make an
9 impassioned speech from the stand that basically said they
10 all -- all the rest of the street got it wrong and he's the
11 only one who understands the treatment of how the treatment
12 of claims ought to be here and all the other reports are
13 wrong and I think Your Honor, in evaluating market evidence,
14 needs to or would want to consider the credibility of Eureka,
15 putting it in light of the mistakes of their own reports,
16 being the only one who gets it right.

17 Your Honor, I also would point out Trial Exhibits
18 189 and 190, the Lehman reports, the Lehman report from
19 Appaloosa's own files. This is the report that Appaloosa
20 received the week they purchased their only set of interests
21 in this case, which occurred after the Chapter 11 was filed
22 and that was the report where Lehman Brothers told Mr. Tepper
23 that the trade claims in this case, the unsecured claims,
24 would get forty to seventy cents on the dollar, clearly
25 meaning that there was no value for equity here at that

1 point.

2 Your Honor, I also think the testimony of Mr.
3 Sheehan and Mr. Williams in the redirect examination was
4 quite helpful in addressing a number of presumptions that
5 were made and I just want to briefly touch on those.
6 Appaloosa criticized the fact that certain of the OPEB
7 assumptions in the steady-state projections differed from
8 what would be in the FAS-106 report. Mr. Williams offered
9 credible and uncontroverted evidence about the reasons behind
10 that, stating specifically that well look, our FAS report
11 doesn't always line up with what the actual experience people
12 have the last five years, Mr. Williams said. Our report had
13 ended up -- they thought our report, they would have been off
14 budget significantly because the actual experience was higher
15 than our assumptions and thought and then testified that it
16 was reasonable for them to do what they did.

17 The second thing that -- the other big criticism
18 that they had was of Mr. Williams's projections as it related
19 to pension exhibit, Trial Exhibit 242. Again, I thought,
20 Your Honor, if you read the entire trial exhibit and consider
21 Mr. Williams's testimony, again, a very credible rebuttal
22 from Mr. Williams in which he said look, you know,
23 effectively, there is no silver bullet in coming out of
24 Chapter 11 on June 15th or June 30th or September 15th of
25 2007, that his scenario has demonstrated simply what would be

1 paid and while there would be some amounts -- that minimum
2 amounts would be smaller in the early part of the year and
3 greater in the later part of the year, that wouldn't change
4 the overall payments that would have to be made. They would
5 simply be made the next year and the year after. And
6 Appaloosa turned that into a savings. Your Honor, I
7 understand that's common on a snapshot basis, but the reality
8 is, from the actuarial experts, the testimony clearly, I
9 thought, Your Honor, would argue that it was extremely
10 credible on explaining that what was suggested in the trial -
11 - in the reply brief, again, was simply wrong.

12 Your Honor, I also would ask that Your Honor recall
13 the evidence. Again, I thought Mr. Sheehan's presentation
14 and his evidence was extremely credible on his redirect
15 examination. He walked Your Honor through -- and using the
16 steady-state projections, those we agreed were to be the
17 baseline that the debtors would be held to here in terms of
18 what we would be presenting here at trial, that the steady-
19 state projections he walked through and I think gave Your
20 Honor very credible explanations about GM volume, about
21 materials, about the run rate, the EBITDA, the seasonality
22 and the cyclicalality of that.

23 Dealing with the GM negotiations and UAW
24 negotiations and why they failed pre-petition, dealing with
25 impairment concerns raised by those creditors as it related

1 to the balance of the capital structure. Again, very
2 detailed examination and testimony from Mr. Sheehan on each
3 of those items, among other things, pointing out the, again,
4 error in Mr. Aragon's assumptions that gee, the difference
5 between the website, and I guess it was the testimony, I
6 think, of Mr. Hyman, one of the two of them, went to a
7 website and looked at the -- the GM website and looked at
8 North American production, assumed that that North American
9 production number applied to Delphi, and didn't understand
10 that there's another program, the NUMMI/CAMMI program, a
11 dealing between GM and Toyota, in which Delphi has no
12 content; and, therefore, there's a difference of the numbers
13 and our projections and theirs because we don't build those
14 cars and we don't build the parts for those cars. And,
15 consequently, the variance was explainable. And Mr. Sheehan,
16 I believe, in his examination made it clear that he was --
17 that he had a very credible explanation for that.

18 In summary, Your Honor, you know, without the
19 evidentiary support for it, under Appaloosa's theory espoused
20 here today, you would always appoint an equity committee in a
21 Chapter 11 case because under their theory, the balance sheet
22 never matters, market evidence never matters. Valuation is
23 always hypothetical, since it can't take into account future
24 events and you have to rely on their view on an emergency
25 valuation with no support in the case law for that and, oh,

1 by the way, any time a board of directors determines the
2 debtors appear hopelessly insolvent, a determination these --
3 this board of directors made only in response to the United
4 States Trustee's request that we respond to Appaloosa's
5 letter, then that board of directors automatically
6 disqualifies themselves from being adequately able to
7 represent equity.

8 The comment here, and the only -- and I'll close on
9 this, Your Honor. One of the statements Mr. Lauria made was
10 to those of us working in this reorganization, and I know to
11 my board is extremely offensive, and that is the suggestion
12 that the debtors and the -- where their officers and
13 directors, the debtors and their advisors, quote, "don't have
14 to worry about old equity."

15 The plain testimony from Mr. Sheehan, and I think
16 the Court knows from the conduct of this case, is these
17 debtors are all about maximizing business enterprise value.
18 If, at the end of the day, the pie is big enough for lots of
19 people when we carve it up, that will be the optimal result.
20 But sitting here today -- sitting here today, under the case
21 law that applies to a request for the appointment of an
22 equity committee and in response to the inquiries of the
23 United States Trustee, the fact of the matter is, these
24 debtors appear to be hopelessly insolvent, based on the facts
25 that are before this Court, the trial record that exists in

1 this Court and under any -- we believe under any analysis,
2 Appaloosa has utterly failed to carry their burden.

3 Thank you, Your Honor.

4 THE COURT: Okay.

5 **CLOSING ARGUMENT FOR THE CREDITORS' COMMITTEE**

6 MR. ROSENBERG: Your Honor, I'll be extremely brief.

7 Everybody who plays in this space knows about
8 Appaloosa, and I don't have to belabor their size,
9 sophistication, strength in this sector, et cetera, et
10 cetera.

11 I will also tell the Court that I can vouch
12 personally for the size and sophistication of Brandes. Until
13 about five years ago, they were my personal money manager and
14 they did very well, indeed.

15 (Laughter.)

16 MR. ROSENBERG: Having said that, notwithstanding
17 all of the publicity that this motion has gotten over the
18 last month; and, in particular, over the last week in the
19 national press across the board, I find it fascinating that
20 not one human being, one shareholder who actually is in need
21 of the protection of a fiduciary, has come forward and said,
22 yes, Appaloosa is right, we need a fiduciary.

23 Furthermore, the fact that Brandes is here today
24 demonstrates that Appaloosa, Brandes, and a few other
25 sophisticated holders, if they care to do so, can get

1 together, function as an informal committee and create or
2 attempt to create the value for equity that doesn't exist
3 today. And needless to say, Your Honor, on one level I'm
4 really rooting for them because if they create value for
5 equity, that means that my constituency gets par-plus-
6 accrued-interest compounded at the default rate, and I will
7 be very happy to have had that happen.

8 And indeed, we have gotten a very good taste over
9 the last month or so of the skill and aggressiveness and
10 resources that Appaloosa, in its own interest and, therefore,
11 necessarily in the interest of all equity-holders, can bring
12 to the table in this regard. But, Your Honor, the question
13 is: On whose nickel, in the context of present hopeless
14 insolvency, present hopeless insolvency?

15 I shudder to think ahead to some time in May, when I
16 examine the bills, the cost of this litigation getting here
17 today, to the estate and unfortunately, that's inevitable,
18 even under the argument I'm presently making to you because
19 as Appaloosa goes forward, spending its own resources, as it
20 should, to create value for itself and other shareholders in
21 the process, the estate is going to bear the burden of it, no
22 matter what. But the estate should not be asked, under the
23 present circumstances, to bear the burden of Appaloosa's side
24 of their aggressive litigation tactics, designed to create
25 value for them and again, in the process for me, so that's

1 okay.

2 The last point that I'd like to make is simply this.
3 Mr. Butler chose to take offense on behalf of his client by
4 something that Appaloosa said. I choose to do the same, and
5 that is the constant harping on the -- two of the major
6 issues in this case at the moment, the debtors' motion for
7 ten percent of the reorganized equity for management and the
8 ongoing issues involving the unions and GM.

9 I think Your Honor has already seen a track record
10 of aggressive protection of the interests of stakeholders by
11 the creditors' committee on these issues. I assure you that
12 will continue in this hopelessly insolvent situation that
13 presently exists.

14 With due respect, we do not need the help of an
15 equity committee to protect, on our nickel, and that's whose
16 nickel it is at the moment, the interests of the stakeholders
17 of those issues. Thank you.

18 **CLOSING ARGUMENT FOR JPMORGAN, ET AL**

19 MR. ZIMAN: Your Honor, I too will try to be brief,
20 especially because I'm following such luminaries. I couldn't
21 resist.

22 Your Honor, JPMorgan, as an agent for the pre-
23 petition lenders, joins the debtors and the U.S. Trustee in
24 opposing the motion. I think the record is clear. It is
25 ineluctably clear that Appaloosa hasn't met its burden on

1 showing that there's a substantial likelihood of meaningful
2 distribution on today's facts and circumstances to equity.

3 Mr. Lauria alluded to several times in his closing
4 somehow that the standard was, you know -- that there might
5 be value and that is not the standard of this Circuit and
6 it's not the standard that should be applied by the Court
7 today.

8 I think there's four things that operate here and it
9 really just points out the fact that if nothing else, this
10 motion is way premature, if it ever should be brought again
11 at all. That enterprise values is contingent on a labor deal
12 happening, that the recovery all constituents depends on that
13 labor deal and the claims that arise out of it, because if
14 nothing else, we've heard that there was a lot of speculation
15 over what the claims would be. The debtor hasn't offered a
16 number. I think that's probably smart, given that it's an
17 unknown. Appaloosa is putting a pin in it and saying it's
18 \$2.6 billion, but that's based on nothing but pure
19 speculation.

20 Third, that an equity committee would not have a
21 meaningful role in the terms of the renegotiated labor deal,
22 I think that is something Your Honor focused on in the
23 opening remarks. I think it was, you know, a pressing
24 observation. I think that this negotiation is a delicate one
25 that's taking place between the three constituents at issue.

1 I think others involved in this matter will have an
2 opportunity to weigh in after the fact and Appaloosa, as Mr.
3 Rosenberg pointed out, will have that opportunity, too, as
4 would Brandes, given its substantial resources.

5 I think with that, Your Honor, I'll step down and
6 let Ms. Leonhard make her remarks. Again, I would propose
7 granting the motion.

8 THE COURT: Okay.

9 **CLOSING ARGUMENT FOR THE U.S. TRUSTEE**

10 MS. LEONHARD: Good evening, Your Honor. Alicia
11 Leonhard for the United States Trustee.

12 Last, but not least, Your Honor, the United States
13 Trustee joins in the comments and the arguments of the
14 objectors and requests that the Court deny the motion. Thank
15 you very much.

16 THE COURT: Okay. All right. I'll take a five-
17 minute break and then I'll be back. Well, I'll be back at
18 6:15.

19 (Recess taken at 6:01 p.m.)

20 THE COURT: Please be seated.

21 I have in front of me a motion by Appaloosa
22 Management, LP, a substantial shareholder of the parent
23 Delphi entity, for the appointment of an official committee
24 of equity security-holders under Section 1102(a)(2) of the
25 Bankruptcy Code.

1 The motion is opposed by the debtors, the Official
2 Unsecured Creditors' Committee, the agent for the pre-
3 petition lenders, and the United States Trustee.

4 It has been joined in by another large and
5 sophisticated management company, Brandes, which unlike
6 Appaloosa, was a pre-petition holder of the debtor's equity
7 interests and represents to the Court that it has, under
8 management with authority to vote, again, a substantial stake
9 in the debtor's equity interests. I believe, if you add the
10 two of them together, they own or control approximately
11 fifteen or sixteen percent of the outstanding shares.

12 Those shares are widely held. There was no
13 testimony on this point, but I believe the record is clear
14 that there are approximately 300,000 shareholders of the
15 publicly traded equity interests. In light of that fact, I
16 believe that it is relevant that the SEC has not taken a
17 position on this motion. There were perhaps contrary
18 representations made to the Court as to why the SEC had not
19 done that, made by counsel to the U.S. Trustee on the one
20 hand, saying that the SEC did not support the motion; and by
21 counsel for Appaloosa, saying the SEC did not support the
22 motion, absent a showing, which it was not taking a position
23 on -- that is, that the SEC was not taking a position on,
24 with regard to whether the debtors at this point are
25 insolvent.

1 This is an important motion because it affects the
2 cost of this case, both directly--that is, the cost of an
3 equity committee and its professionals if I grant the motion--
4 -as well as indirectly, in connection with both the cost of
5 the estate and other estate-compensated professionals,
6 including the Creditors' Committee, in dealing with
7 litigation and other matters raised by an equity committee;
8 and then, in addition, also indirectly, in respect of
9 potential delay that the existence of an equity committee
10 might cause at various stages in the case.

11 Because of its importance, and because of the desire
12 by all parties, at least as initially expressed by all
13 parties, including Appaloosa, to have this matter heard and
14 decided by me quickly, so that if I rule in favor of an
15 equity committee, an equity committee could be appointed
16 quickly before passage of much more time in this case, I have
17 decided to rule from the bench.

18 As I often do with long bench rulings, however,
19 particularly where I cite extensive case law, I reserve the
20 right to correct the ruling based on my review of the
21 transcript.

22 This is a core proceeding under the Bankruptcy Code,
23 as it deals with a committee's appointment under the Code.
24 And one begins, as one must, with the statute, which provides
25 at Section 1102(a)(2) that:

1 "On request of a party in interest, the Court may
2 order the appointment of additional committees of
3 creditors or of equity security-holders, if
4 necessary to assure adequate representation of
5 creditors or of equity security-holders. The United
6 States Trustee shall appoint any such committee once
7 the Court has ordered the appointment."

8 It's well recognized that there is no statutory test
9 for "adequacy of representation," as used in Section
10 1102(a)(2). See, for example, In Re: Johns Manville
11 Corporation, 68 B.R. 155 (SDNY 1986), appeal dismissed 824
12 F.2d 176 (2d Cir. 1987).

13 In light of the absence of a statutory definition of
14 "adequacy of representation," and in light further of the
15 fact that the statute says the Court "may" order the
16 appointment of an additional committee besides the Official
17 Creditors' Committee, the courts have made such
18 determinations on a case-by-case basis in the exercise of the
19 Bankruptcy Court's discretion. See, again, In Re: Johns
20 Manville, 68 B.R. 155, as well as In Re: Becker Industries
21 Corporation, 55 B.R. 945, 948, (Bankruptcy, SDNY 1985), for
22 lists of the factors that the courts have employed in
23 exercising their discretion on a case-by-case basis.

24 I should further note that the case law is clear
25 that the burden of showing a lack of adequacy of

1 representation is upon the movant. Again, see In Re: Johns
2 Manville Corporation, 68 B.R. 155.

3 The factors that the Court is to consider on a case-
4 by-case basis are, by this time, fairly well established,
5 although I should say first and foremost, again, they are
6 merely factors informing the Court's discretion. It is not a
7 litmus test, and no particular factor's absence precludes the
8 appointment of a committee; and, conversely, although if all
9 the factors were present, one would assume a committee would
10 be appointed, the Court still has discretion under the
11 statute, in light of other factors that might be present and
12 relevant, not to appoint a committee. The case law has in
13 large measure developed out of cases decided in the Southern
14 District of New York, but the factors are employed throughout
15 the country. They are laid out in the Becker Industries
16 case, and in the Johns Manville case that I have cited.
17 They're also discussed in, for example, In Re: Kalvar
18 Microfilm, Inc., 195 B.R. 599 (Bankruptcy, District Court of
19 Delaware 1996), and numerous other cases throughout the
20 country. They include:

21 Whether the shares are widely held and publicly
22 traded.

23 The size and complexity of the Chapter 11 case.

24 The delay and additional cost that would result if
25 the Court grants the motion.

1 The likelihood of whether the debtors are insolvent.

2 The timing of the motion relative to the status of
3 the Chapter 11 case.

4 And other factors relevant to the issue of adequate
5 representation, including:

6 The role of the board and management acting on
7 behalf of shareholders.

8 The role of other estate-compensated parties,
9 including the Official Creditors' Committee, and whether they
10 can be said in large measure to be acting on behalf of
11 shareholders, at least insofar as maximizing the value of the
12 estate.

13 And according to some courts, the sophistication of
14 the shareholders, particularly those who have made the
15 motion, and their ability to retain counsel and other
16 advisors.

17 And according to some courts, the right of such
18 parties, if they do make a substantial contribution in the
19 case, to be compensated under Section 503(b) of the
20 Bankruptcy Code.

21 Before discussing those factors in more detail,
22 however, and particularly focusing upon the factor dealing
23 with the debtors' financial condition, which has occupied a
24 great deal of the hearing in front of me, I believe it's
25 relevant and significant also to quote the legislative

1 history of Section 1102(a)(2), because, given the lack of a
2 statutory definition of "adequacy of representation," I
3 believe congressional intent is relevant.

4 The relevant legislative history on the section is
5 not only quoted, but astutely critiqued in Johns Manville at
6 68 B.R. 155 at 160. As noted in that case, one of the
7 purposes of the legislation was, quote:

8 "-- to counteract the natural tendency of a debtor
9 in distress to pacify large creditors with whom the
10 debtor would expect to do business at the expense of
11 small and scattered public investors."

12 That's from S. Rep. No. 989, 95th Congress, Second
13 Session at 10 (1978).

14 The Congressional Report went on to state:

15 "The committee believes that it should be emphasized
16 that investor protection is most critical when the
17 company in which the public invested is in financial
18 difficulties and is forced to seek relief under the
19 bankruptcy laws. A fair and equitable
20 reorganization as provided in the bill is literally
21 the last clear chance to conserve for them values
22 that corporate financial stress or insolvency have
23 placed in jeopardy. As public investors are likely
24 to be junior or subordinated creditors or debt-
25 holders, it is essential for them to have

1 legislative assurance that their interests will be
2 protected. Such assurance should not be left to a
3 plan negotiated by a debtor in distress and senior
4 or institutional debtors who will have their own
5 best interests to look after." Id.

6 The Court in Manville noted, however, that because
7 Congress made the appointment discretionary in the Bankruptcy
8 Court, finding that the Court "may" appoint a committee if
9 necessary to assure adequate representation, it obviously did
10 not take this principle beyond the meaning of the statute.

11 I believe there has been a development in the case
12 law since the Congressional Report was issued, and, frankly,
13 since the Becker Industries case, which was one of the first
14 cases to deal with the appointment of a committee under
15 1102(a)(2), although starting, frankly, with an earlier case,
16 Judge Beatty's case in Emons Industries.

17 The Courts have recognized that even where a Chapter
18 11 case involves a substantial number of public shareholders
19 and is large and complex, the Court should not appoint an
20 equity committee if the debtor appears to be clearly
21 insolvent. That is because, in the words of Judge Beatty in
22 Emons, which appears at 50 B.R. 692 (Bankruptcy SDNY 1985):
23 to do so would, in effect, give the equity committee and the
24 shareholders a gift. And that is because the cost of the
25 committee is borne by the estate.

1 And if it appears, in the words of Emons, that
2 the debtor is hopelessly insolvent, that cost should not be
3 borne.

4 Courts, I believe, because of their experience of
5 cases where equity committees were formed, where equity
6 committees were inordinately litigious and active in such
7 cases and ultimately obtained for their constituents what
8 might charitably be described as a gift, that is, an
9 inducement to go away through a plan, have come to emphasize
10 the point. It's discussed in some detail and with some
11 candor in the Wang Laboratories decision by Judge Hillman at
12 149 B.R. 1 (Bankruptcy, District of Massachusetts 1992), in
13 which Judge Hillman recognized the need not to legitimize
14 what he called the, quote, "blackmail factor" inherent in the
15 presence of an equity committee where, in fact, it appears
16 that the debtor is hopelessly insolvent.

17 The Bankruptcy Code gives parties in interest
18 considerable access to the Court and considerable issues to
19 raise, if they choose, in front of the Court, which obviously
20 has the effect potentially of delaying the prosecution of a
21 Chapter 11 case and causing other parties to incur
22 substantial costs. The benefit to a litigant of controlling
23 an equity committee, or any other official committee, is
24 that, subject of course to Court review, the cost of such
25 litigation is borne by the estate, which raises the stakes

1 and makes it tempting to implement the "blackmail factor"
2 strategy.

3 I believe these are legitimate concerns in this area
4 and they have been recognized by numerous courts, and
5 specifically, in what I believe today to be the leading
6 decision in this area, they were recognized by Judge Lifland
7 in In Re: Williams Communications Group, Inc., 281 B.R. 216
8 (Bankruptcy SDNY 2002), in which he repeated Judge Beatty's
9 concern that an equity committee where the debtor appears to
10 be hopelessly insolvent should not be warranted because, this
11 is a quote:

12 "-- because neither the debtor nor the creditor
13 should have to bear the expense of negotiating over
14 the terms of what is in essence a gift."

15 Judge Lifland used in that quote Judge Beatty's
16 phrase, "appears to be hopelessly insolvent." He also used
17 it at Page 222 -- I'm sorry, at 221 of his opinion.

18 Interestingly, in his conclusion, however, he
19 provides for a somewhat different test than "hopelessly
20 insolvent." He states:

21 "The appointment of official equity committees
22 should be the rare exception. Such committees
23 should not be appointed unless equityholders
24 establish that (i) there is a substantial likelihood
25 that they will receive a meaningful distribution in

1 the case under a strict application of the absolute
2 priority rule, and (ii) they are unable to represent
3 their interests in the bankruptcy case without an
4 official committee." Id. at 223.

5 That is, as to the first prong of his test, it
6 requires more of the movant for an official equity committee
7 to establish than that there are signs of hope of solvency,
8 at least in the general run of such applications.

9 That formulation has since been picked up by another
10 court. Judge Case, whom I certainly respect as a very astute
11 scholar of bankruptcy law, applied the same test in In Re:
12 Northwestern Corporation, 2004 Westlaw 1077913 (Bankruptcy,
13 District of Delaware, May 13, 2004).

14 Now I say that without necessarily accepting it as
15 an ironclad test myself because I believe that all of the
16 courts that look at these issues, including Judge Lifland and
17 Judge Case, would say first and foremost that the various
18 factors enunciated by the Courts are to be applied on a case-
19 by-case basis, in light of the statute and the congressional
20 policy. And that's what I have done in my balancing analysis
21 of all of the factors; that is, I have not imposed upon the
22 movant here the burden of showing "a substantial likelihood
23 that it will receive a meaningful distribution in the case."

24 I do that because this motion is filed early in the
25 case, as opposed to at the time a plan is to be negotiated

1 and/or litigated at confirmation. And I believe that it is,
2 as a result, important for me to give the benefit of the
3 doubt to the movants here.

4 As the debtors have acknowledged candidly, it is too
5 early to formulate a business plan. It is, consequently, too
6 early to formulate a going concern valuation with any
7 credibility; and, finally, it is too early to negotiate a
8 chapter 11 plan. Consequently, all of the analysis of
9 solvency or insolvency here has around it a substantial
10 amount of speculation and doubt. And I believe it would be
11 unfair to impose upon a movant in that context the burden of
12 doing a full-scale going-concern valuation to show a
13 "substantial likelihood of a meaningful distribution."

14 Moreover, I believe that such a full-blown valuation
15 at this time is not what is called for in connection with a
16 motion for the appointment of an equity committee. As Judge
17 Lifland made quite clear in Williams, this is a summary
18 proceeding. The valuation that the Court performs in
19 connection with the proceeding is not binding in any respect
20 on any party with respect to any future valuation of the
21 debtor or its assets, including, most importantly of course,
22 a valuation for chapter 11 plan confirmation purposes.

23 There's an obvious reason for that. It's tied into
24 both the strengths of Congressional policy in permitting
25 equity committees to be appointed under the proper

1 circumstances as well as the potential for abuse of that
2 right; that is, on the one hand, it's unfair to impose the
3 burden of a full-scale valuation on public shareholders in
4 all circumstances, although the burden may be increased in
5 certain circumstances. It is also unfair to the debtor and
6 the other parties whose money is very clearly at risk in the
7 bankruptcy case, namely the creditors, and in this case the
8 workers, of, in essence, causing the motion for the
9 appointment of an equity committee to take over the entire
10 case so that under the rubric of "valuation" the movant for an
11 equity committee can use all of the cost and delay leverage
12 that an equity committee might have even before the equity
13 committee is appointed, to engage the parties in litigation
14 on the merits of the key issues in the case.

15 That would be an absurd result. I believe, frankly,
16 that's why I was so angry at Appaloosa's attempt repeatedly
17 to turn this matter into such a proceeding and why the case
18 law is crystal-clear that that is not what the Court is to
19 consider.

20 Now let me -- before that, let me note that although
21 Judge Lifland makes that crystal-clear in his opinion, he's
22 not the only judge to have done so. In fact, Judge Case in
23 Northwestern didn't have an evidentiary hearing at all. He
24 did not believe it was appropriate. The Court in Leap
25 Wireless, 295 B.R. 135 (Bankr. S.D. Cal. 2003) was frustrated

1 as to the lack of substance behind the debtors' schedules,
2 but, again, only treated the matter as a summary proceeding
3 and took whatever evidence she had and weighed that into her
4 analysis with respect to whether a committee should be
5 appointed.

6 So I believe, both logically and under the case law,
7 there is no basis to expand the inquiry that I need to
8 undertake here to force parties to conduct full-blown
9 valuations on either side of the solvency issue.

10 Now, to apply the various factors. As I noted
11 before, this is a large public company. There's over 500
12 million of issued and outstanding common shares and over
13 300,000 public shareholders. This is obviously also a large
14 and complex bankruptcy case. The docket is already
15 substantial, and it is clear to me that far more than is
16 reflected in the docket is being done by the debtor and other
17 parties behind the scenes in respect to resolving the key
18 issues in this case.

19 Those issues are complex, both in terms of the
20 negotiating and human dynamics, as well as the qualitative
21 and quantitative analysis in regard to the underlying
22 documentation, the parties' rights under the Bankruptcy Code
23 and other law, including labor law and ERISA; and they
24 ultimately involve numerous important judgment calls that in
25 the first instance the debtor must make in consultation with

1 key constituencies in the case, and that ultimately I must
2 make when the debtor goes to seek approval of what it has
3 negotiated. So those factors clearly call for the
4 appointment of an equity committee.

5 It is also argued that the debtors' management and
6 board is not actually representing the interests of the
7 shareholders as well as those of all of the other
8 constituencies for which they are fiduciaries; and, to some
9 extent, it is argued that they cannot represent those
10 interests.

11 As to the latter point, to the extent it's made, I
12 do not accept that analysis. Clearly, the board of a public
13 company and its management owes a duty in a bankruptcy case
14 not only to the creditors, assuming that the debtor is
15 insolvent, but also to the shareholders. And there is no
16 built-in bias there against shareholders. As noted by Judge
17 Robinson in Edison Brothers Stores, 1996 Westlaw 534, 853
18 (District Court of Delaware, 1996), a movant needs to show
19 more than simply speculation as to such a conflict.

20 It's additionally argued that the very fact of the
21 complexity of this case and the debtors' natural desire to
22 resolve the case may lead the debtor to give short shrift to
23 shareholders' views. That, I believe, has some merit to it;
24 and, frankly, the argument is, I believe, consistent with the
25 legislative history that I quoted earlier.

1 That's particularly the case here where there truly
2 are extremely difficult negotiations that the debtors must go
3 through. And I believe that it is important for the debtors
4 to be fortified in those negotiations by the views of key
5 constituencies. I believe that has occurred with regard to
6 the Creditors' Committee, as is reflected, I believe, by the
7 constructive relationship between the Creditors' Committee
8 and the debtors that I've viewed in this case. I say
9 "constructive," rather than "hand-in-glove" because it is very
10 clear to me that the Creditors' Committee is nobody's patsy
11 by any means and makes its views known to the debtor very
12 clearly and forcefully, even if those views are unwelcome.

13 It's not particularly clear to me that that same
14 voice has been expressed by the shareholders. Partly, that
15 is the fault of the shareholders, at least the sophisticated
16 ones. For example, I am shocked that Appaloosa made this
17 motion and sent the threatening letter to the board that it
18 sent asserting the allegations that it made without once
19 communicating with the debtor. And I'll return to that
20 later.

21 But Appaloosa, as Mr. Lauria stated, should not
22 really be the focus of a motion to appoint an official equity
23 committee, although Appaloosa's problems may be the focus of
24 who the U.S. Trustee appoints to a committee.

25 Now Appaloosa also alleges that there are actual

1 conflicts over and above the debtor's tendency in a very
2 large and difficult case not to reach out to a constituency
3 that has not reached out to it. Again, I have a hard time
4 seeing that. I certainly do not see a level of actual
5 conflict at the level alleged by Appaloosa in what I again
6 believe was irresponsibly loose language.

7 There are really two bases for Appaloosa's
8 allegation.

9 The first is that because at the start of these
10 cases the debtors proposed what I feel free in calling a
11 generous KECP package that included an allocation of post-
12 reorganization equity to post-reorganization management, the
13 debtors' management--and to the extent the board approved the
14 KECP, the board--believes that management's interests are
15 different than shareholder interests. I note, however, and
16 this, frankly, was obvious to Appaloosa, or at least should
17 have been, that that motion has been repeatedly adjourned and
18 tabled pending further negotiations with the creditors
19 committee, which as I said is nobody's patsy, and secondly,
20 is subject ultimately to my approval.

21 I also note that, traditionally, provisions for
22 allocation of post-reorganization equity for management are
23 dealt with in a plan that is voted upon by those entitled to
24 vote, and, generally, that is done because those entitled to
25 vote then see how they're being diluted. Generally,

1 notwithstanding some cases where shareholders recover
2 something in respect of their old equity, the major issuance
3 of post-reorganization equity in chapter 11 cases goes to the
4 creditors, and they are the ones who are usually most diluted
5 by such management incentive plans in respect of post-
6 reorganization equity. In other words, I believe Appaloosa's
7 argument on this point is miscast and at best irrelevant and
8 I believe, again, almost willfully so.

9 Secondly, Appaloosa argues that the debtors' very
10 opposition to this motion shows that the debtors' management
11 and board have an actual conflict in representing the
12 interests of the shareholders, primarily because the debtors
13 have stated that for purposes of this motion, at this time,
14 they are clearly or hopelessly insolvent. The debtors'
15 objection to the motion, to the contrary, is clearly in good
16 faith. As Mr. Sheehan and Mr. Resnick testified, the
17 debtors' goal is to maximize value for all constituencies. I
18 might understand why an unsophisticated shareholder who did
19 not understand the limited issues and inquiries relevant to a
20 motion under section 1102(a)(2) might make the argument, but,
21 knowing Appaloosa's sophistication, I find this "actual
22 conflict" argument to be rhetoric.

23 As to the timing factor, because of the very serious
24 issues that the debtors are dealing with in these cases,
25 going to the heart of their business, this is to me obviously

1 not a simple balance sheet restructuring where the capital
2 structure simply needs to be adjusted because there's too
3 much funded debt on the books.

4 There are serious -- to use the debtors' phrase
5 "transformational issues" that have to be resolved here.
6 Because of that, I believe that this is the appropriate time
7 to move for an equity committee, and not to wait until later
8 in the day when a plan is actually being negotiated.

9 I also believe as a corollary to that, the function
10 of the equity committee and the makeup of its professional
11 advisors should be reflected by this timing. As I'll say
12 later, again, I think this leads to the conclusion that
13 although it's not before me, except in my need to weigh the
14 cost of an equity committee's appointment, that it's unlikely
15 that I would approve the retention of investment bankers and
16 accountants or even actuaries at this time for an equity
17 committee, since those functions are not really the functions
18 that need to be performed at this time by an equity
19 committee.

20 So that in contrast, while in the Loral case I
21 believe that it was incumbent to have an equity committee, if
22 at all, towards the end of the case, here, I believe if it is
23 incumbent on there being an equity committee, this is the
24 time to have one formed.

25 It is even conceivable to me that if I did form an

1 equity committee now and it turned out that ultimately I
2 approved interim transformational solutions --
3 transformational solutions to the labor and related pension
4 and GM problems that the debtors face--it might be
5 appropriate to disband the equity committee because, in light
6 of those solutions, it might appear clearly at that time that
7 the debtor was hopelessly insolvent or at least that it was
8 likely that there would be no distribution to shareholders.

9 But because of the importance of those pending
10 issues, one could at least see a rationale for having an
11 equity committee with counsel in the near future to deal at
12 least with those transformational issues on behalf of the
13 shareholders.

14 Now, as far as whether the debtor is insolvent or
15 hopelessly insolvent or there is a likelihood of a meaningful
16 distribution to shareholders, I am at this time on this
17 record frankly skeptical that there will be a meaningful
18 distribution, but I'm not prepared to rule it out. I say
19 that for a number of reasons.

20 First of all, it's undisputed that on a balance-
21 sheet basis, and it is correct that the movants' experts did
22 not disagree that on a balance sheet basis, the debtors'
23 operating -- most recent operating numbers comply with GAAP,
24 there is roughly a 6.3-billion-dollar hole, or insolvency.

25 The question, obviously, is how does one fill that

1 hole or bridge that gap?

2 Although Appaloosa's experts made some effort to do
3 it on the asset side, my review of their analysis is that
4 they have not in any meaningful respect convinced me on the
5 asset side of the balance sheet or in their going-concern
6 value, their enterprise value before deductions, that they
7 have -- they have established a credible case to do so.

8 When you really boil it down, giving the benefit of
9 the doubt to why and how the admitted one-billion-two-dollar
10 -- two-hundred-million-dollar error was corrected by Eureka,
11 what Eureka did was essentially look at the debtors' 2005
12 actual performance and annualize the debtors' actual
13 performance for the first 115 days of 2006 for an EBITDA
14 figure that they then multiplied by two different multiples.

15 I believe Mr. Sheehan's testimony as to why,
16 particularly in respect of the annualization of the first
17 quarter of 2006, Eureka's process was materially if not
18 perhaps fatally flawed, in respect of the Eureka expert's
19 analysis of why the debtors did better in the first quarter
20 of 2006 and what the debtors' properly projected earnings
21 should be.

22 Clearly, to me, Mr. Sheehan's explanation of the
23 debtors' analysis of their projected business with GM and the
24 reason for the potential front-loading of income in 2006 was
25 credible and accounted for the difference between the

1 bottoms-up projections that the debtors did and the
2 effectively back-of-the-envelope calculation that Eureka did
3 in respect of EBITDA, and I say "back of the envelope"
4 because, frankly, given the billion-two error on its March
5 10th report, that's all Eureka was really left with: applying
6 a multiple to 2005 and the first quarter actual numbers of
7 2006 without proper analysis of why those figures can be
8 relied upon as the basis for projected EBITDA.

9 I do recognize, however, that Mr. Sheehan
10 acknowledged that it is possible that the debtor's balance-
11 sheet numbers on the asset side might be higher. It's my
12 experience, and I think most people's experience who've dealt
13 with Chapter 11 debtors for a lengthy period, that that's
14 hardly ever the case. Almost invariably, the balance sheet
15 overstates the assets, but that's Mr. Sheehan's belief, and
16 he has clearly been through an intensive analysis of the
17 business on a bottoms-up basis and I accept his statement.

18 Now, on the balance sheet liability side, which is
19 most -- where most of the dispute arises, I've considered the
20 testimony of Messrs. Reese and Williams. And, frankly, I
21 believe that it's very hard on the record to find any exact
22 number as far as what would be the appropriate net savings in
23 respect of OPEB liabilities after the debtors resolve their
24 transformational issues.

25 Clearly, Appaloosa's argument that the OPEB

1 liabilities go away because the collective bargaining
2 agreements go away in 2007 is -- well, it's almost laughable.
3 The unions aren't going away, and the employees aren't going
4 away without being paid for giving up those rights or having
5 them reinstated in some form.

6 So all the parties recognize that there is a price
7 to resolve those liabilities, including Appaloosa. The issue
8 is how much of a price has to be paid and how much of a
9 savings can the debtors generate. I find it hard to believe
10 that despite all of their efforts and all of an equity
11 committee's efforts, there will be a material recovery for
12 shareholders in light of those OPEB negotiations, but the
13 company doesn't preclude it as a possibility. There are
14 scenarios in which it could occur. That's agreed to by both
15 sides in this proceeding.

16 And, therefore, while Eureka's March 10th report, as
17 corrected for the billion-two error, still shows on even the
18 most optimistic basis a two-hundred-and-thirty-four-million-
19 dollar insolvency hole, given the huge amounts at stake here
20 in respect of the labor negotiations--and we're talking about
21 potential savings of billions of dollars, I know it's hard to
22 believe it, but \$234 million may not be that big of a gap, at
23 least on today's record.

24 I also looked, of course, as Judge Lifland did and
25 Judge Hillman did and other courts have done in connection

1 with motions under 1102(a)(2), at the trading prices of the
2 debtors' securities when evaluating the debtors' solvency.

3 It's common knowledge that the market in distressed
4 debt and to some extent distressed stock, but more -- more
5 the case of distressed debt, is large, indeed, huge, and
6 active, particularly with respect to public companies such as
7 Delphi. That is reflected among other things by the numerous
8 Wall Street analysts' reports covering the debt introduced
9 here.

10 There's uncontroverted evidence that Delphi's public
11 debt has consistently traded since the petition date at or
12 below sixty cents on the dollar. The courts at times have,
13 although not accepting as controlling the trading prices of
14 debt securities, consistently looked at trading prices in the
15 debtors' securities as a indication in this type of summary
16 proceeding of value.

17 Courts obviously know, at least this Court knows,
18 that people engage in a market because they're making various
19 bets on the value of securities. Some are betting that it's
20 a good idea to sell, and some are betting it's a good idea to
21 buy. Generally, it's an active market; and, generally,
22 active markets are a good indication of value because there
23 are both buyers and sellers at reasonably arm's length
24 bargaining positions.

25 However, of course, those markets are not guarantees

1 of value. That's why some analysts get fired and some get
2 promoted. Market security trading price indicators are most
3 telling where they're quite low, where they're in my
4 experience below or well below fifty cents on the dollar,
5 particularly in respect of cases that are in all likelihood
6 going to be resolved one way or another in a fairly short
7 term, and, in the life of a chapter 11 case of a large
8 company, fairly short term is around a year.

9 It's clear to me and it's been clear from the start
10 of these cases that although the debtors are pushing these
11 cases, appropriately so, as fast as they can, this is a
12 longer term process. They project emergence from bankruptcy
13 in 2007, although they are doing everything they can to
14 emerge sooner than that.

15 Given that, I am not particularly moved either way
16 by the trading ratios or prices. Mr. Lauria is correct that
17 anyone buying distressed debt is looking for a large return
18 to make up for the risk, particularly where the debt is
19 unsecured, and so it's conceivable that a sixty-percent-on-
20 the-dollar level, while obviously not suggesting solvency,
21 may indicate at least a hope of solvency.

22 This is, for example, different than the trading
23 levels in Loral, which were considerably lower, or in
24 Williams, which were at 15% to 6% of face value.

25 So, all things considered, in respect of the

1 solvency analysis, at this point in the case, I cannot find
2 that appointing an equity committee would be a gift. On the
3 other hand, I am very mindful of the cost to these estates of
4 an equity committee.

5 Some cost clearly is legitimate. The whole reason
6 you have an equity committee is that the estate bears the
7 cost. On the other hand, the way that this litigation has
8 been conducted, I mean this litigation in front of me right
9 now, by Appaloosa, gives me very serious pause as to whether
10 the cost ultimately will be appropriate in this case.

11 Now, Appaloosa says I can regulate that by looking
12 at fee applications and the like, but, to some extent, once
13 an equity committee is appointed the cat is out of the bag,
14 and so I have thought very long and hard about whether the
15 cost factor here should lead me not to appoint a committee.

16 I can say this, that I will look very carefully at
17 fee applications of any counsel that is chosen to represent a
18 committee. I also will look very carefully at whether the
19 continued incurrence of fees is appropriate at various stages
20 in the case where the picture on valuation becomes clearer.

21 But, ultimately, standing alone, as I do believe
22 that I can perhaps with the help of the United States Trustee
23 control costs, the costs alone are not in my mind
24 dispositive, although they are a major factor here calling --
25 arguing that I should not appoint a committee.

1 The last point which is raised by some courts, it's
2 specifically raised by Judge Case in the Northwestern
3 opinion, is that at least Appaloosa went into this bankruptcy
4 case with its eyes wide open. Judge Case thought that was a
5 clear factor calling for denial of the motion. And of course
6 the ability of certain shareholders to fund their own
7 professionals also is clearly a factor arguing against a
8 committee. See Williams, 281 B.R. at 223.

9 If this were a relatively small pool of
10 shareholders, I would -- I would obviously do the same. I
11 don't think the fact that Brandes has joined in the motion
12 particularly helps Appaloosa's cause, because Brandes is
13 obviously very well-heeled, very sophisticated and is well
14 represented by another large national firm with a bankruptcy
15 practice.

16 However, I go back to the first point I made. There
17 are over 300,000 shareholders here. Given the rapid change
18 in their fortunes from June of 2005 to today, it's fair for
19 me, I think, to assume that some of them may be in the
20 investor equivalent of a state of shock or disbelief and that
21 that's why they're not showing up here today.

22 It seems to me, again, that given the important
23 transformative events that will be taking place in this
24 company through this bankruptcy case over the next few
25 months, it's important to give those people representation,

1 and if a committee is formed that adequately represents them,
2 then I think that they're entitled to it within the
3 parameters that I've already described.

4 Now, in discussing or mentioning the abrupt changes
5 that have taken place in the fortunes of this company, I do
6 not want to suggest, as Appaloosa, I think, has, that the
7 company has done something over the last several months
8 between June of 2005 and today or even between June of 2005
9 and October when it filed for bankruptcy that is somehow
10 nefarious or improper in respect of its business or its
11 shareholders.

12 I think it's irresponsible to suggest that.
13 Clearly, this company has extremely difficult problems to
14 resolve. To suggest that it should have spent all of its
15 cash on hand before filing to resolve those problems, to
16 suggest that it should continue with the steady-state
17 projections, which even Appaloosa recognized would lead to
18 the destruction of the debtors' business is absurd and was
19 truly a waste of this Court's time, and, frankly, for those
20 who are not particularly sophisticated and read such
21 allegations in the press, again, Appaloosa's argument or
22 insinuation in this regard was a truly irresponsible attack
23 on the company.

24 So I will order the appointment of an official
25 equity committee. I'm going to be very clear as to the -- my

1 expectation as to at least the -- my initial reaction to a
2 request by that committee for retention of professionals.

3 I do not believe that the proper functioning of a
4 committee of equityholders at this time calls for the
5 appointment and retention of investment bankers, accountants
6 or actuaries, and a premise -- a fundamental premise of my
7 ruling is that I would not appoint such parties,
8 professionals at this time.

9 What an equity committee needs to do is to
10 understand through its own members' expertise, and I trust
11 that there will be sophisticated parties like Brandes on the
12 committee, and through the assistance of its counsel, the
13 pressing issues of this case in respect of labor, pension,
14 other benefits and GM.

15 It needs to be informed, it needs to give the debtor
16 its views so that they can be taken into account as the
17 debtor proceeds.

18 To the extent that it feels it needs to do due
19 diligence on actuarial assumptions, I believe an appropriate
20 arrangement can be worked out with regard to using the
21 creditors committee's actuaries.

22 I do not expect an equity committee or its
23 professionals to try to inject themselves into the extremely
24 sensitive negotiations that are ongoing between the debtors,
25 the unions, GM and other parties in the labor transformation

1 issue process.

2 They should be able, however, again, to communicate
3 their views to the debtor and be able to be reasonably
4 informed as to the process so that they can make a
5 determination as to whether to oppose or support it whenever
6 an agreement is brought to the Court.

7 It's very clear that one function of a committee may
8 require the committee at times to take an adversarial role in
9 a case. However, I believe that consistent with all the case
10 law that I've just cited, it is not proper for an equity
11 committee to view its job as one to create leverage by being
12 a thorn in everyone's side.

13 If the equity committee is not engaged in a two-way
14 dialogue with the debtor, I will believe, and I will act on a
15 motion that contends that, the committee is dysfunctional and
16 disband it.

17 I will also look very closely, and I know that the
18 United States Trustee will look very closely, at any
19 suggestion that the equity committee is taking action in
20 court or otherwise not to maximize recoveries for all
21 committee constituents, but instead to artificially pump up
22 the value of the current stock on a trading basis.

23 I am very concerned about the potential that that
24 has already happened in this case--not by an official
25 committee and obviously not by an equity committee, because

1 one has not been appointed, but by parties involved in this
2 litigation, and I will look at the facts closely, and I've
3 already looked closely at the facts of the apparent release
4 of confidential information.

5 And, having looked at those facts, I continue to
6 have serious questions about that apparent release, and if,
7 in fact, Appaloosa applies to be a member of this committee,
8 I direct the U.S. Trustee to investigate those facts.

9 In short, the equity committee needs to be
10 responsible in looking after the interests of the equity-
11 holders as a group, and I trust it will do so.

12 So, Mr. Lauria, you can submit an order to that
13 effect.

14 COUNSEL: Thank you, Your Honor. Thank you, Your
15 Honor.

16 THE COURT: Thank you.

17 (Proceedings concluded at 7:17 p.m.)

18 CERTIFICATION

19 We certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter to the best of our
22 knowledge and ability, except where, as indicated, the Court
23 has modified its bench ruling.

24 _____ March 23, 2006
25 Coleen Rand
Certified Court Transcriptionist/Agency Director
Rand Transcript Service, Inc.

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March 23, 2006

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Jennifer Linnartz
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March 23, 2006

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Cathryn Lynch
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